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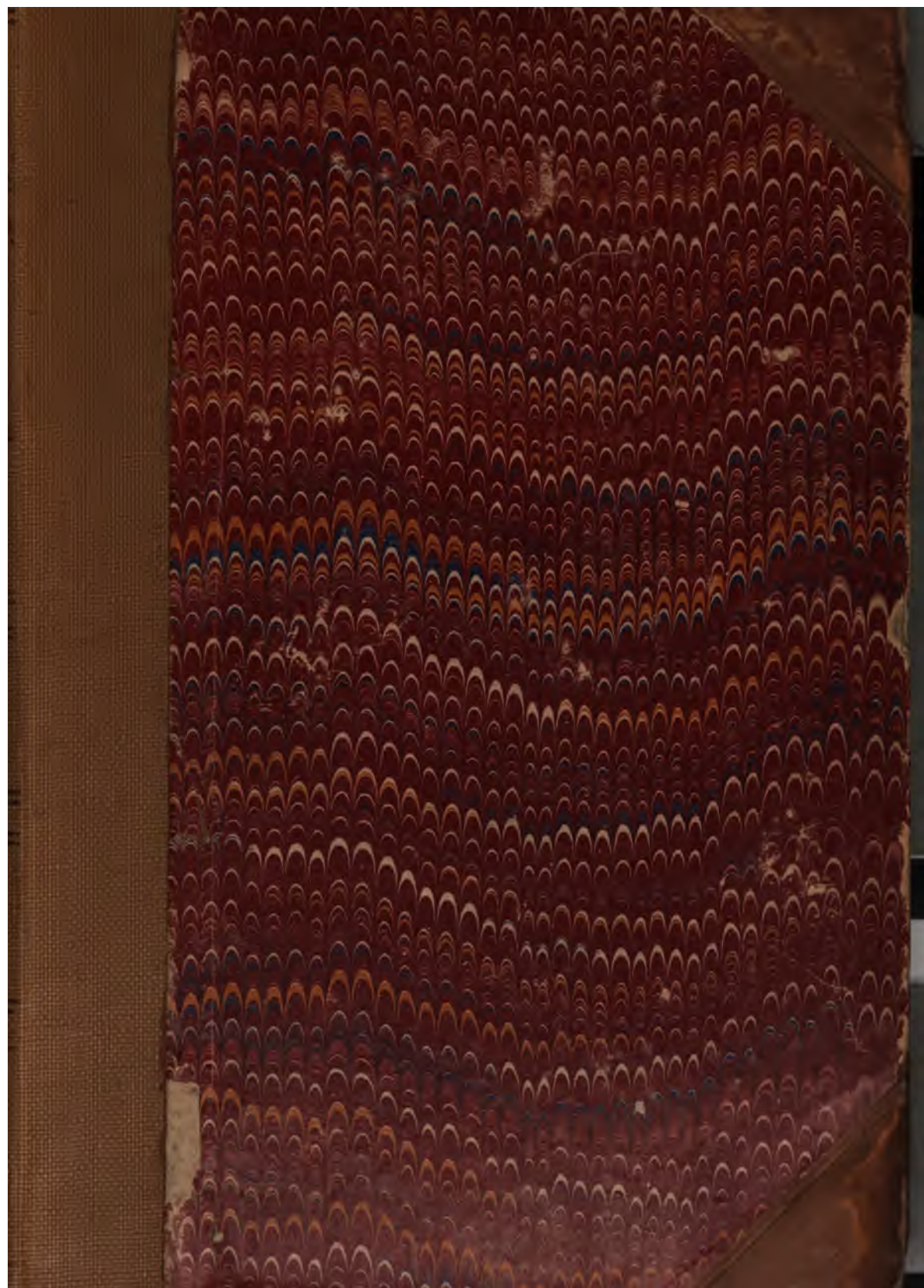
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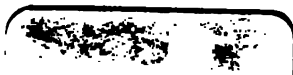
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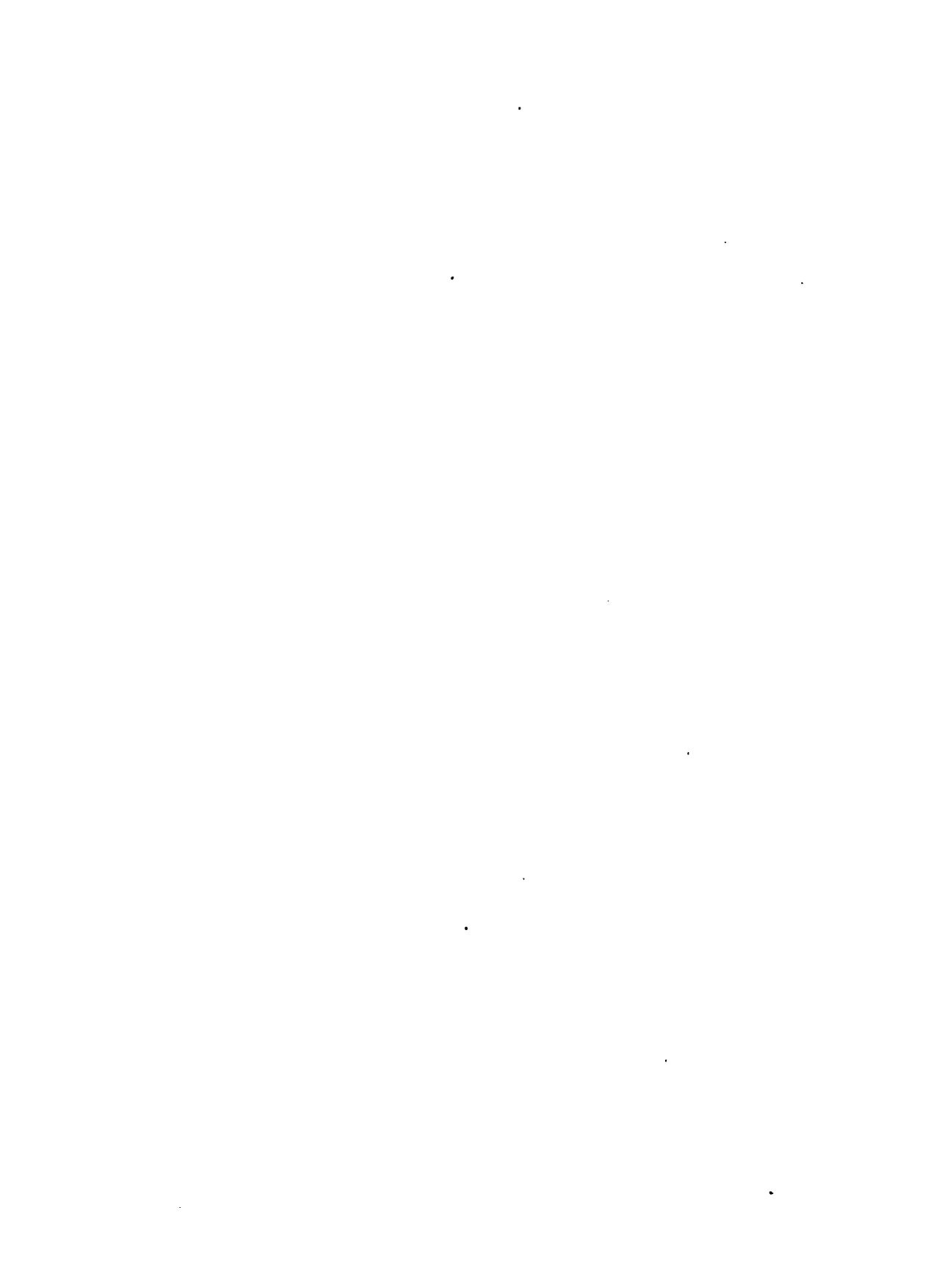
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A TREATISE ON THE LAW
RELATING TO THE
EXECUTION AND REVOCATION
OF
WILLS,
AND TO
TESTAMENTARY CAPACITY.

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WITH AN APPENDIX CONTAINING "THE WILLS ACT, 1873,"
AND A NUMBER OF USEFUL FORMS OF WILLS.

BY
RICHARD THOMAS WALKEM,
OF OSBOODE HALL, BARRISTER-AT-LAW.

TORONTO:
WILLING AND WILLIAMSON.
MDCCLXXIII.



Entered according to the Act of the Parliament of Canada, in the year One Thousand Eight Hundred and Seventy-three, by WILLING & WILLIAMSON, in the office of the Minister of Agriculture.

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TO
THE HONOURABLE OLIVER MOWAT,
Attorney-General

FOR THE PROVINCE OF ONTARIO,

THIS WORK IS RESPECTFULLY DEDICATED

BY

THE AUTHOR.

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Garni : Amos
January 1874

AUTHOR'S PREFACE.

THE idea of writing this work was suggested to me by the difficulty I experienced, when a student, of assuring myself of the true state of the law of this Province on the subjects treated of in the following pages.

There is probably no country in the world which can boast of a more perfect system of legal education than that established in Ontario, through the provident wisdom of the Law Society. To the Benchers of that body I, in common with others, owe a debt of gratitude for the efforts they have made in the cause of legal education. But students of law in this Province labour under the disadvantage of being obliged to use text-books which, unless very carefully studied, are likely to leave erroneous impressions. If we take up a modern English text-book, we will find in it a number of statutory provisions which have no place in our law; and we will fail to find in it the changes in the old law which have been effected in this Province by the legislation of eighty years.

To ascertain the true state of our law, the student must be careful to disregard the English Statute law, as stated in the text-books, and must search our own Statutes to ascertain the changes in the old law which have been effected in this country.

I have endeavoured, by compiling this book, to obviate this inconvenience so far as concerns the subjects on which I have written; and to furnish to the student or the practitioner a work which he may consult with confidence, and which will save him many hours of labour. With this view, I have stated the old law, and the changes which have been made by Statute, being careful to explain, as well as I was able, the effect of the Statutes upon

the old law and upon each other. I had thought, when I began my work, that my object could have been effected in a few pages; and I had, more than a year ago, completed a book for publication, when the passing of our new Wills Act compelled me to begin my work afresh.

As a compensation for the additional labour thus imposed on me, I am enabled to present to the profession a complete book, whose value will not probably be impaired by statutory changes for several years to come.

Bearing in mind the necessity for logical division in a legal text-book, I have been careful so to divide the various subjects that they can be readily referred to. The sources from which the matter of the work has been derived are acknowledged in the notes; and I have incorporated into the text, to a greater extent, perhaps, than is usual, portions of the judgments in what may be considered leading cases. The judgments which I have selected are such as contain valuable information.

To the text is added an Appendix, containing "The Wills Act, 1873," and a number of useful Forms of Wills.

I have collected the latest cases in our own and the English Courts. These latter are of peculiar value, inasmuch as our new Act has been adopted from the Imperial Statute 1 Vict. c. 26.

I trust that the profession, in judging of the result of my work, will bear in mind that the compiler of a legal text-book for use exclusively in this Province, can at present expect no material return for his labour, except the good opinion of his professional brethren, if he should be considered to have succeeded in his undertaking. Even should the reverse be the case, they will, I am sure, always be gentle in their criticisms.

R. T. W.

23rd October, 1873.

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BOOK THE FIRST.

OF THE ORIGIN OF THE LAW OF ONTARIO AND OF THE NATURE AND INCIDENTS OF WILLS.

CHAPTER I.

OF THE ORIGIN OF THE LAW OF ONTARIO.

1. Law of Ontario derived from law of England.
2. Statute 32 Geo. 3, c. 1, Con. Stat. U. C., c. 9, s. 1.
3. Effect of 1 Vict., c. 26.
4. State of the law as to Wills of personal estate in Ontario unsatisfactory.
5. Effect of 4 W. 4, c. 1, ss. 48, 49, 50, 51.
6. Jurisdiction conferred on the Court of Chancery to set aside wills for fraud and undue influence.
7. Nuncupative wills limited by 33 Geo. 3, c. 8.
8. Provisions of 32 Vict., c. 8.
9. Assimilation of our law to the English law by "The Wills Act, 1873."

1. The law of Ontario on the subject of wills is the law of England as it stood on the 15th day of October, 1792, except in so far as that law has been altered or modified by Canadian Statutes. BOOK I.
CHAP. I.

2. By Con. Stat. U. C. c. 9, re-enacting 32 Geo. 3, c. 1, it is provided (a) that in all matters of controversy relative

(a) s. 1.

BOOK I. to property and civil rights, resort shall continue to be
 CHAP. I. had to the laws of England, as they stood on the 15th day
 of October, 1792, as the rule for the decision of the same.

3. The Imperial Act 1 Vict., c. 26, effected a great alteration in the law of wills in England, but the legislative changes in this Province, since the statute 32 Geo. 3, c. 1, have, until recently, occupied but a small space in our statute books.

4. The state of the law regarding the formalities necessary to the validity of wills of personal estate, prior to the passing of "The Wills Act, 1873" (a), was by no means satisfactory. There seems to be no good reason why the testamentary title to personal estate should be based upon a less secure foundation than the title to real estate, particularly since the former has relatively become of such enormous value. The assimilation of our law of wills to that of England, by the recent statute, may, therefore, be considered the fulfilment of a legislative duty too long neglected.

5. By 4 W. 4, c. 1 (b), provisions were introduced which affect the nature of devisees' tenure (c), the power of disposing by will of real estate acquired after the making thereof (d), the construction of wills with respect to the quantity of estate devised (e), and the mode of executing wills of real estate (f).

6. By the Chancery Act (g) jurisdiction is conferred upon the Court of Chancery to try the validity of wills, both of real and personal estate, and to pronounce such wills void for fraud and undue influence or otherwise, in the same manner and to the same extent as the court has jurisdiction to try the validity of deeds and other instruments.

(a) Stat. Ont. 36 Vict., c. 20.

(b) Con. Stat. U. C., c. 82, ss. 10, 11, 12, 13.

(c) s. 48.

(d) s. 49.

(e) s. 50.

(f) s. 51.

(g) Con. Stat. U. C., c. 12, s. 28.

7. By 33 Geo. 3, c. 8 (a), nuncupative wills were placed under numerous restrictions, and by the Surrogate Courts Act (b) (Con. Stat. U. C., c. 16, s. 83) they were abolished, but an exception is made in favour of soldiers in actual military service, and mariners or seamen being at sea, who are permitted by the Act, as they are by "The Wills Act, 1873," to dispose of their personal estate in such manner as they then might according to the laws of England (c).

BOOK I.
CHAP. I.

8. By 32 Vict., c. 8, the Legislature of Ontario introduced some important changes affecting the wills of persons dying after the 31st December, 1868. It is provided by this Act (d) that every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. The same statute contains important provisions adopted from the Imperial Act 1 Vict., c. 26, as to the revoking effect of deeds executed by a devisor after the execution of a will, and as to revocation by marriage, or by presumption from alteration of circumstances; and by s. 5 the provisions of the English statute regarding revocation by burning, tearing, &c., are made part of the law of this Province.

9. Finally, by "The Wills Act, 1873" (e), which, generally speaking, will apply only to wills made after the 31st December, 1873, the whole law relating to the subjects treated of in this work has been placed upon a clear and satisfactory basis. The provisions of this Act have been almost literally adopted from the English Act, 1 Vict., c. 26, as amended by late statutes, and the decisions of the English courts upon that Act will therefore be applic-

(a) ss. 7, 8, 9.

(b) Con. Stat. U. C., c. 16, s. 83.

(c) See post chapter on nuncupa-

tive wills.

(d) S. 1.

(e) Stat. Ont. 36 Vict., c. 20.

BOOK I. able to our own statute. The advantage of this alteration
CHAP. I. in the law cannot be too highly appreciated; and it is
hoped that the provisions of the new Act, which may be
regarded as the offspring of the experience acquired during
many generations, will be found so satisfactory as to
render but little amendment necessary for many years to
come.

CHAPTER II.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

1. The subject of this chapter of the highest importance.
2. Law of testator's domicile at time of making will and of death governs execution of will of personal estate.
3. Opinion of Lord Westbury in *Enohin v. Wylie*.
4. Statement of the law by Lord Chelmsford in *Whicker v. Hume*.
5. Will of real estate governed by the *lex loci rei sitæ*.
6. Difficulty of determining true domicile, and rules laid down by Lord Loughborough and Sir J. Leach upon the subject.
7. Question of domicile treated of fully by Story and other writers.

1. The possession of property in one country, by persons domiciled in another, is now so general, that the inquiry by what local law a testamentary disposition of such property must be governed, is of the highest importance.

BOOK I.
—
CHAP. II.

2. After much conflict of authority, it has been settled that the law of the testator's domicile, at the time of making his will and of his death, if there is no intermediate change, must govern the form of the will of personalty, and the solemnities of its execution; so that, if a testator be domiciled in a foreign country, and own personal estate in Ontario, a will executed according to the law of the country in which he is domiciled at the time of his death would be recognized in Ontario as a valid disposition of such property (a). When the

(a) *Whicker v. Hume*, 7 H. L. C. 124; 4 Jur. N. S. 933; 28 L. J. Ch. 124. *Crispin v. Dogliani*, 3 S. & T. 96; 32 L. J. P. 169; 8 L. T. N. S. 518; 9 Jur. N. S. 653; nom. *Dogliani v. Crispin*, affirmed in Dom. Proc. L. R. 1 H. L. C. 301; 35 L. J. P. 129; 13 L. T. N. S. 44. *Stanley v. Bernes*, 3 Hagg. 373. *Bremer v. Freeman*, 10 Moo. P. C. 306. *Anstruther v. Chalmers*, 2 Sim. 1. *Price v. Dewhurst*, 8 Sim. 299; 4 My. & Cr. 76.

Spratt v. Harris, 4 Hagg. 408. *Ferraris v. Hertford*, 3 Curt. 468; 7 Jur. 262. *Crocker v. Hertford*, 4 Moo. P. C. 339; 8 Jur. 863. *Reynolds v. Kortwright*, 18 Beav. 417. *Dolphin v. Robins*, 7 H. L. C. 390. *De Bonneval v. De Bonneval*, 1 Curt. 856. *Re Daly's Settlement*, 25 Beav. 456. *Pechell v. Hilderley*, L. R. 1 Prob. 673; 38 L. J. P. 66; 20 L. T. N. S. 1014.

BOOK I. law of the domicile, at the date of the will, differs from
 CHAP. II. the law of the domicile at the testator's death, the latter
 law prevails (a).

3. In *Enohin v. Wylie* (b), Lord Westbury observed, "I hold it to be now put beyond the possibility of question that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy or intestacy belong to the Judge of the domicile. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicile belong the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator, is the prerogative of the Judge of the domicile. In short, the Court of the domicile is the forum concursus, to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort."

4. And in *Whicker v. Hume*, cited above, Lord Chelmsford said: "There is no doubt that it is the province and duty of the Ecclesiastical Courts to ascertain what was the domicile of the party whose will is offered for probate, in order to ascertain whether that is a valid will, the testator having complied with all the requisites of the law of the country in which he was domiciled. But if probate is granted of a will, then that conclusively establishes in all Courts that the will was executed according to the law of the country where the testator was domiciled." "No other Court could go back upon the factum and raise any question upon the validity of the will." These cases,

(a) *Bremer v. Freeman*, sup. 402; 6 L. T. N. S. 263; 10 H. L. C. 1.
Whicker v. Hume, sup.

(b) 8 Jur. N. S. 897; 31 L. J. Ch.

Which are of the highest authority, contain a clear statement of the law upon this subject.

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CHAP. II.

5. A will of real estate is governed by the law of that country in which the property is situated, the *lex loci rei sitæ* (a). This rule is founded on the principle that it would not comport with the dignity, the independence, or the security of any independent state or nation, that these incidents should be liable to be affected in any manner by the legislation, or the decisions of the courts of any state or nation besides itself (b). If, therefore, a person, domiciled abroad, desires to devise real estate owned by him in this country, his will must be executed with all the formalities prescribed by our law, the law of the domicile being altogether disregarded.

6. It is frequently difficult to determine what was the actual domicile of the testator at the time of his death. "The question of domicile," said Lord Loughborough, in the case of *Bempde v. Johnstone* (c), "prima facie, is much more a question of fact than of law. The actual place where he (a person) is, is prima facie, to a great many purposes, his domicile. You encounter that if you show it is either constrained, or from the necessity of his affairs, or transitory; that he is a sojourner; and you take from it all character of permanency. If, on the contrary, you show that the place of his residence is the seat of his fortune; if the place of his birth, upon which I lay the least stress; but if the place of his education, where he acquired all his early habits, friends, and connexions, and all the links that attach him to society are found there; if you add to that that he had no other fixed residence upon an establishment of his own, you answer the ques-

(a) *Bovey v. Smith*, 1 Vern. 85.
Bowman v. Reece, Pre. Ch. 577.
Drummond v. Drummond, 3 Bro.
 P. C. Toml. 601. *Brodie v. Barrie*,

2 V. & B. 131.

(b) 1 Redf. Wills, 398, 399.

(c) 3 Ves. 201.

BOOK I. tion, which would be—where does he reside?” And in
 CHAP. II. *Munro v. Douglas* (a), Sir J. Leach remarked: “Domicile
 is not lost by mere abandonment; it is not to be de-
 feated animo only, but animo et facto; and necessarily
 remains until a subsequent domicile be acquired, unless
 the party die in itinere toward an intended domicile (b).

7. It would be beyond the limits and object of this
 work further to consider the nice distinctions which are
 created by the conflict of the laws of different States. For
 these distinctions, and for a more minute statement of the
 law, the reader is referred to Story and other writers on
 the subject (c).

(a) 5 Mad. 379.

(b) See also *Craigie v. Lewin*, 3
 Curt. 435; 7 Jur. 519. *Atty.-Gen.*
v. Fitzgerald, 3 Drew, 610. *Lord v.*
Colvin, 4 Drew, 366. *Lyell v. Paton*,
 25 L. J. Ch. 746.

(c) See as to the Law of Domicile,
Hayes & Jarm. Wills. Domicile.
 App. 531, where much useful in-
 formation may be found.

CHAPTER III.

DEFINITIONS.

1. Definition of a "will."
2. A will is in its own nature ambulatory and revocable during the testator's lifetime.
3. Opinion of early writers that an appointment of an executor was necessary to the validity of a will. This rule become obsolete.
4. Effect under old law of a will in which there was no appointment of an executor.
5. Definition of a "codicil."
6. A codicil forms part of the will.
7. Definition of a "devise."
8. Difference between a devise of realty and a will of personalty.
- n. (b) Powers conferred by 4 W. 4, c. 1; 32 Vict., c. 8; and 36 Vict., c. 20.
9. Definition of "bequest."
10. A will cannot be made merely for the purpose of appointing a guardian.
11. A will differs from a deed.
12. Distinction between real and personal estate, as connected with the execution of wills.
13. Swinburne's opinion concerning definitions.

1. A will is defined by the old Roman lawyers to be "*voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit*," which is thus translated by Blackstone: "The legal declaration of a man's intentions which he wills to be performed after his death" (a). The definition adopted by that eminent writer is, "a right given to the proprietor of continuing his property after his death in such persons as he shall name" (b). When the will operates upon personal property, it is sometimes called a "testament"; when upon real estate, a "devise"; but the more general denomination of the instrument embracing

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(a) 2 Black Comm. 499. To this definition should be added, "respecting personal estate." 1 Williams

Exors. 6.
(b) 2 Black Comm. 490.

BOOK I. both real and personal property is that of "last will and
CHAP. III. testament."

2. It is characteristic of a will that it is in its own nature ambulatory and revocable during the life of the testator, even though it should in terms be made irrevocable (a).

3. It was the opinion of the early authorities, that it was essential to the validity of a will of personal estate that it should contain an appointment of an executor. Thus Swinburne remarks (b): "That the naming or appointing of an executor is said to be the foundation, the substance, the head, and is, indeed, the true formal cause of the testament, without which a will is no proper testament, and by the which only the will is made a testament." And of the same opinion was Godolphin, who says (c): "The appointment of an executor is the very foundation of the testament, whereof the nomination of an executor, and the *justa sententia* of the testator, are two main essentials" (d). And the authority of these writers is supported by an early case, in which it was held that, without an executor, a will is null and void (e). In later times, however, this rule has become obsolete; so that now a testament is good, though no executor is appointed by it (f).

4. An instrument which, in former times, was not operative as a will, by reason of the omission to appoint an executor, was not, on that account, altogether ineffectual; for its provisions were held to be binding on the

(a) 1 Jarm. Wills 12. 1 Williams Exors. 10. *Vynior's case*, 8 Co. 82 a. *In the goods of Robinson*, L. R. 1. Prob. 384; 36 L. J. P. 93; 17 L. T. N. S. 19.

(b) Pt. 1, s. 3, pl. 19.

(c) Pt. 1, c. 1, s. 2.

(d) See also 1 Williams Exors. 7.

(e) *Woodward v. Lord D'Arcy*, Plowd. 185. See also *Chadron v. Harris*, Noy 12; Finch 45 b. Bro. test. pl. 20. *Att.-Genl. v. Jones*, 3 Price 383.

(f) 1 Williams Exors. 7. *Wyrall v. Hall*, 2 Ch. Rep. 112.

administrator under the denomination of a "codicil" (a). Swinburne and Godolphin accordingly define a codicil to be "the just sentence of our will touching that which we would have done after our death, *without the appointing of an executor* (b); and hence a codicil was called "an *unsolemn last will*" (c).

5. A codicil, from *codicillus*, a diminutive of *codex*, is now understood to be a supplement to a will, or an addition, made by the testator, and annexed to, and to be taken as part of the testament; being for its explanation, or alteration, or to make some addition to, or else some subtraction from the former dispositions of the testator (d).

6. A codicil is essentially a part of the will itself, all forming one testament (e). This rule is strongly exemplified by the case of *Sherer v. Bishop* (f). There the testator gave the residue of his personal estate among such of his relations only *as were mentioned in that his will*; he, afterwards, made a codicil, which he directed to be taken as part of his will; and a second, by which he gave legacies to two of his relations, but gave no such direction: and it was held by Lord Commissioner Eyre (*dubitantibus*, Ashurst, J., and Wilson, J.), that as every codicil was a part of the testamentary disposition, though not part of the instrument, the relations named in the second codicil were entitled to a share of the residue (g).

(a) 1 Williams Exors. 7, and authorities there cited.

(b) Swinb. Pt. 1, s. 5, pl. 2. Godolph. Pt. 1, c. 6, s. 2.

(c) Swinb. Pt. 1, s. 5, pl. 4. Godolph. Pt. 1, c. 6, s. 2.

(d) 2 Black Comm. 500. Swinb. Pt. 1, s. 5, pl. 5. Godolph. Pt. 1, c. 6, s. 1. 1 Williams Exors. 8.

(e) 1 Williams Exors. 8. *Fuller v. Hooper*, 2 Ves. sen. 242, per Lord Hardwicke. *Crosbie v. MacDougal*, 4 Ves. 510. *Evans v. Evans*, 17 Sim.

108. *Hartley v. Tribber*, 16 Beav. 510. And see *Reeves v. Newenham*, 2 Ridgw. I. P. C. 43.

(f) 4 Bro. C. C. 55.

(g) This decision has been considered as carrying the principle too far. See 1 Williams Exors. 8 n. (e). *Hall v. Severne*, 9 Sim. 515—518. *Pigott v. Wilder*, 26 Beav. 90. *Fuller v. Hooper*, 2 Ves. sen. 242, and supplement by Belt. 333. See also cases cited in 1 Williams Exors. 9 n. (u).

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7. The term "devise" is applied, almost exclusively, to a testamentary disposition of real estate. It is regarded by Blackstone less as a will or testament, than as a conveyance or appointment of property, and is classed by him amongst the modes of *conveying* real property (a).

8. One main difference between a devise of realty and a will of personalty consisted in the fact, that the former could only pass real estate of which the testator was seized at the time of making the devise, whereas the latter operates upon whatever personal estate a man dies possessed of, whether acquired before or since the execution of the instrument (b).

9. The term "bequest" is applied to both legacies and devises, and is understood to embrace both real and personal estate (c). In the American Courts, it has been held that the words "devise," "bequest" and "legacy," may be applied indifferently to real and personal estate, if such appears, by the context of the will, to have been the testator's intention (d).

10. The law gives no authority to make a will for the mere purpose of appointing guardians to children. Such an appointment is of no binding force, except as enforced by the conditions attached to the disposition of property (e). In a late case in England, it was held, that an instrument executed as a will, but which contained only an appoint

(a) 2 Black. Comm. 373. 1 Williams Exors. 6. *Duppa v. Mayo*, 1. Saund. 277, e. note (4). Per Lord Mansfield in *Harwood v. Goodright*, Cowp. 90.

(b) 1 P. W. 575. 1 Williams Exors. 6. By 4 W. 4, c. 1, s. 49 (Con. Stat. U. C. c. 82, s. 12), power was given to a testator to devise real estate acquired by him after the making of his will; and by 32 Vict., c. 8, s. 1, a will is made to take effect with regard to both real and personal estate as if executed immediately before the death of the testator, unless a

contrary intention appears by the will.

"The Wills Act, 1873" (36 Vict. c. 20), which applies to wills made after the 31st December, 1873, provides (s. 5), that every person may dispose by will of all such real and personal estate as he shall be entitled to at the time of his death.

S. 21 of the same Act is a re-enactment of s. 1 of 32 Vict., c. 8.

(c) 1 Jarm. Wills, 702, n. k.

(d) *Dow v. Dow*, 36 Maine, 211. *Ladd v. Harvey*, 1 Foster, 514.

(e) 1 Redf. Wills, 4, n. 2.

ment of guardians to the testator's children, was not entitled to probate (a).

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11. A will is in its nature different from a deed, and though executed with the formalities of a deed, it cannot operate as such (b).

12. The attention of the reader is called to the distinction between *real* and *personal* estate, in connection with the execution of wills, and the capacity to make them. It will be seen hereafter, that there is a wide difference in the formalities of execution necessary to the validity of wills of real and personal estate respectively; and there still exists and will continue to exist, until "The Wills Act, 1873," comes into force, a marked distinction between the age at which a will of personal estate may be made, and that fixed by law as the minimum age at which a testator may devise his real estate.

13. Concerning definitions, Swinburne remarks (c): "Definitions are said to be dangerous in law: the cause may be attributed to the multitude of different cases, the penury of apt words, the weakness of our understanding, and the contrariety of opinions," and are "subject to the rigorous examination of all sorts of men, and must abide the doubtful verdict of the sharpest wits, and endure the dreadful sentence of the deepest judgments. And it is rare if at the last, after long and superstitious revolution, one man at least among so many subtle and captious conceits do not espy some defect or excess in the definition whereby the same may be subverted. Which thing if it come to pass, then like as when the captain is slain the soldiers are in danger to be discomfited, or as the foundation being

(a) In the goods of Morton, 3 S. & T. 422; 33 L. J. P. 87; 9 L. T. N. S. 809. See also *Gilliat v. Gilliat*, 2 Phillim. 222. *Lady Chester's case*, 1 Ventr. 207.

(b) *Lord Darlington v. Pulteney*, 1 Cowp. 260. *Atty.-Gen. v. Jones*, 3 Price, 368.
(c) Swinb. Pt. 1, s. 3, pl. 1.

BOOK I. ruinous, the building is in peril of falling ; so the definition
CHAP. III. being overthrown, all the arguments drawn from thence,
and whatever else dependeth thereupon, is in peril to be
overturned. No marvel then if definitions be reported to
be dangerous.

“ But if contrary to the common course the definition be
so just, so perfect that it cannot be justly reprov'd, this
definition, besides that it is not perilous, is so profitable
and so necessary, that from thence, as from the root and
fountain, every discourse ought to take his beginning.”

BOOK THE SECOND.

OF THE CAPACITY TO MAKE A WILL.

CHAPTER I.

CLASSIFICATION OF DISABILITIES.

1. All persons capable of making a will, except those who labour under disability.
2. Classification of disabilities adopted by Blackstone.
3. Blackstone's classification not sufficiently ample.
4. Classification of persons of unsound mind, by Lord Coke.

1. The question of testamentary capacity may be most easily considered, by premising that all persons, except such as labour under some disability or incapacity, are competent to dispose of their property by will (*a*).

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—
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2. These incapacities or disabilities are stated by Blackstone to be—1. want of sufficient discretion; 2. want of sufficient liberty and free will; 3. criminal conduct (*b*).

3. It may be questioned, however, whether Blackstone's classification is sufficiently ample to include all the particular species of disability; and, in treating of this subject, the writer will adopt that classification which is most convenient.

4. Persons of unsound mind are thus classified by Lord Coke (*c*): 1. An idiot or fool natural; 2. He who was of

(*a*) 1 Williams Exors. 11. Swinb.
Pt. 2, s. 1.
(*b*) 2 Black. Comm. 496—497. 1

Williams Exors. 11.
(*c*) Beverly's case, 4 Co. 123.

- BOOK II.** good and perfect memory, and by the visitation of God
CHAP. I. hath lost the same ; 3. Lunaticus qui gaudet lucidis inter-
vallis, who sometimes is of good and perfect memory, and
some other times non compos mentis ; 4. He that is so by
his own act, as a drunkard.

CHAPTER II.

DISABILITY FROM ALIENAGE.

1. Old law prohibited aliens from holding real estate in Canada.
2. Abolition of this restriction by 12 Vict., c. 197, s. 12, (Con. Stat. C., c. 8, s. 9).
3. Effect of this Act.
4. Rule laid down by Sir E. Sugden, that alien incapable of holding real estate.
5. Trust of lands in favour of an alien invalid.
6. Alien might take by devise, subject to right of Crown.
7. Alien friend could take personalty under the will of a subject.

1. Formerly no alien was competent to hold lands in Upper Canada. The rule forbidding the acquisition of real estate by aliens is, however, directly opposed to the interests of a new and unsettled country; and the expediency of permitting aliens to acquire real estate in this Province, and of according to them the privileges of British subjects, led to the abolition of the old restrictions.

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CHAP. II.

2. By 12 Vict., c. 197, s. 12 (a), it is provided, that "every alien shall have the same capacity to take, hold, possess, enjoy, claim, recover, convey, devise, impart, and transmit real estate in all parts of this Province (then the Province of Canada), as natural born or naturalized subjects of Her Majesty, in the same parts thereof respectively: Provided always, that nothing herein contained shall alter, impair or affect, or be construed to alter, impair or affect, in any manner or way whatsoever, any right or title legally vested in, or acquired by, any person or persons whomsoever, before the twenty-third day of November, 1849."

(a) Con. Stat. C., c. 8, s. 9.

BOOK II. 3. The disability of alienage, in regard to the holding
CHAP. II. and devising of real estate in this Province, is, by this Statute, entirely removed (a); but, as there are many titles whose origin dates back to a period anterior to the time mentioned in the Act—namely, the 23rd November, 1849—it may be useful to refer shortly to the nature of the disabilities to which, prior to that date, aliens were subjected.

4. It is laid down by Sir Edward Sugden, as the rule of English law (and on the subject in question the law of England was formerly the law of this Province), that “aliens are incapable of holding real estate; for, although they may purchase, yet it can only be for the benefit of the King, and, upon an office found, the King shall have it by his prerogative” (b).

5. Nor was a trust of lands in favour of an alien valid (c); though a devise or conveyance to a trustee to sell and pay the proceeds to an alien was valid; for, in such a case, neither the legal nor the equitable title to the lands was vested in the alien: he had merely a right to the proceeds of sale (d).

6. As an alien might purchase, subject to the right of the Crown, so he might take by devise, which is a purchase in the eye of the law (e). But an alien could not, though the Crown had neglected to exercise its prerogative, transmit by hereditary descent; for he had no inheritable blood, and on his decease [his lands escheated to

(a) *Murray v. Heron*, 7 Grant 177.

(b) See Sugd. V. & P., c. 20, s. 2, p. 685. *Doe d. Richardson v. Dickson*, 2 U. C. O. S. 292.

(c) *The King v. Holland*, Aleyn 14. 1 Roll's Ab. 194, pl. 8. *Doe d. Richardson v. Dickson*, 2 U. C. O. S. 292.

(d) *Du Hourmelin v. Sheldon*, 1 Beav. 79; S. C. 4 My. & Cr. 525.

Dumoncell v. Dumoncell, 13 Ir. Eq. Rep. 92. *Barrow v. Wadkin*, 2 Beav. 1. *Fish v. Klein*, 2 Mer. 43. See the observations of the Chancellor in *Murray v. Heron*, 7 Grant 178.

(e) Co. Litt. 2, b. Powell D. 316. 10 Mod. 113–125. *Dyer*, b. n.

the Crown without office found (*g*). A conveyance by an alien was good except as against the Crown (*h*).

BOOK II.

CHAP. II.

7. As the disability of alienage depended on feudal and political reasons, which affected only real estate, it is, and always has been, competent for an alien to make and take under a will of personal estate in Upper Canada (Ontario); unless, indeed, it should happen that he were an alien enemy, in which case he could not make a valid will of personalty, unless by force of special license from the Crown to reside and transact business within our jurisdiction during the continuance of hostilities (*i*).

(*g*) *Doe d. Robinson v. Clark*, 1 U. C. R. 37. Per Chancellor Kent, *Moers v. White*, 6 Johns. Ch. 360—366. *Collingwood v. Pays*, 1 Sid. 193; 1 Vent. 413; 1 Plow. 229 k, 230 a. *Doe d. Paterson v. Davis*, 5

U. C. O. S. 494.

(*h*) *Doe d. Macdonald v. Cleveland*, 6 U. C. O. S. 117.

(*i*) Vin. Ab. Devise G. 17. Bac. Ab. Wills, B.

CHAPTER III.

OF DISABILITY FROM INFANCY.

1. Law on this subject still the same as on 15th October, 1792.
2. Powers conferred by 32 H. 8, c. 1.
3. Effect of 34 & 35 H. 8, c. 5.
4. Effect of 12 Car. 2, c. 24.
5. Infants thought to have power under 32 H. 8, c. 1, to devise lands. Better opinion is, that they had not.
6. No power to devise lands conferred on infants since 34 & 35 H. 8, c. 5.
7. Power of infants to make wills of personalty.
8. Infants deprived in England, by 1 Vict., c. 26, of the power to make a will.
9. Infants deprived in Ontario, by "The Wills Act, 1873," of the power to make a will.
10. Power of infant to make a will dependent on his having sufficient discretion.
11. Effect of ratification on attaining majority.
12. Construction of 21st section of "The Wills Act, 1873."
13. Power of infants to appoint guardians to their children by will.
14. Consequences of this power as regards real estate.
15. Infants' power of appointing guardians abolished by "The Wills Act, 1873."
16. Mode of computing time of attainment of majority.

BOOK II. 1. The law defining the age at which persons are at
CHAP. III. liberty to dispose of their real and personal estate by will
in Ontario, is still (a) the same law which was in force in
England on the 15th day of October, 1792.

2. The Statute 32 H. 8, c. 1, provided that all persons
might dispose by will of their lands held in socage, and
two third parts of those held by knights-service.

3. It being found necessary to explain this Act, the
Statute 34 & 35 H. 8, c. 5, was passed a few years after-
wards, by which it was provided, that all persons, being
seized in fee simple, might, by will and testament in

(a) In 1873.

writing, devise to any other person, except to bodies corporate, all their lands, tenements and hereditaments held in fee simple, and two thirds of those held by knights-service; but it was provided by the 14th section of the Act, that "wills and testaments made of any manors, lands, tenements or other hereditaments, by any woman covert or person within the age of twenty-one years, idiot or any person de non sane memory, shall not be taken to be good or effectual in the law."

4. At a subsequent period, by 12 Car. 2, c. 24, the tenure by knights-service was converted into socage, so that the power of testamentary disposition, created by the Act, became general.

5. The exception contained in the later Act would lead to the conclusion that, during the short interval which elapsed between the passing of the two Statutes of Henry, infants possessed the power of devising their real estate. This seems, however, according to the best opinions, not to have been the case (*a*). The question is unimportant, as the later Statute expressly excepted infants.

6. No power of devising lands has since been given to infants by any English or Canadian Statute; so that, now, all persons under the age of twenty-one years are absolutely incapable of disposing of their real estate by will (*b*).

7. The law upon the question of want of sufficient age to make a will of personalty stands, however, upon a very different footing. Testaments of personal estate having early become subject to the jurisdiction of the English Ecclesiastical Courts, those Courts applied to them the

(*a*) 1 Jarm. Wills, 27-28, and cases cited in the notes. Powell Dev. 3rd Ed. 125-126.

(*b*) As to whether a married woman, being an infant, can devise her

real estate under the 16th section of Con. Stat. U. C., c. 73, see Leith's R. P. Stat. 283. The opinion of that learned writer is, that an infant married woman has no such power.

BOOK II. rules and principles of the Civil law (a). It was held
 CHAP. III. therefore, and is now law in Ontario, that a male of the
 age of fourteen years, or a female of the age of twelve
 years, may make a valid disposition of his or her personal
 property by will (b).

8. The English Statute, 1 Vict. c. 26, took away from
 infants the power of testamentary disposition in England.
 It is provided by the 7th section of that Act, that "no
 will made by any person under the age of twenty-one
 years shall be valid."

9. By "The Wills Act, 1873" (c), this section, adopted
 literally from the English Statute, has been enacted in
 this Province as to wills made after the 31st December,
 1873. Wills made on or before that date, however, will
 be governed by the old law.

10. Though exception cannot be taken to a will of per-
 sonalty by a boy of fourteen or a girl of twelve, on the
 ground of want of age merely, yet, if such a testator have
 not sufficient discretion to make a will, the testament will
 be void (d). Such a case comes within the second head
 of disabilities mentioned by Blackstone.

11. It is laid down by English writers that the ratifica-
 tion of a will, after the testator arrives at the age required
 to execute a valid will, although executed before that age
 renders it a valid will (e); but, unless ratified, such a will
 does not become operative on the infant's attaining his
 majority (f).

(a) 1 Williams Exors. 14.
 (b) *Anon.* Comb. 50; 1 Salk. 44.
Hyde v. Hyde, Prec. Ch. 316; S. C. Gilb. Eq. Rep. 74. *Bishop v. Sharpe*, 2 Vern. 469. *Ex parte Holyland*, 11 Ves. 11. *Arnold v. Earle*, MS. cor. Sir Geo. Lee, 5th June, 1758, cited in 4 Burn. E. L. 45 n. (9) by Tyrwhitt; S. C. 2 Cas. temp. Lee, 529. 1 Williams Exors. 14. 2 Black. Comm.

497.
 (c) S. 6.
 (d) 2 Black. Comm. 497. 1 Williams Exors. 15.
 (e) 1 Williams Exors. 16. Swinb. Pt. 2, s. 2, pl. 7. Bac. Abr. Wills, B. 2.
 (f) Sugd. R. P. Stat. 330. 1 Williams Exors. 16. *Herbert v. Torba*, 1 Sid. 162. Swinb. Pt. 2, s. 2, p. 5.

12. The 21st section of "The Wills Act, 1873," which provides that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, etc., will not render valid a will which was invalid when made by reason of the non-age of the testator, though the testator should survive until he becomes of full age (a).

13. Male infants were enabled by the statute 12 Car. 2, c. 24, to appoint guardians to their children under twenty-one years of age. The Statute provided (b) that any father, *within the age of twenty-one*, or of full age, who should leave any child under twenty-one and not married, may, *by deed or will*, executed in the presence of two witnesses, dispose of the custody of such child or children during such time as he or they should continue under twenty-one, or any less time, to any person or persons other than popish recusants; and it gives to such person the custody of the infant's estate, both real and personal, and the same actions as guardians in socage.

14. It will be seen that an infant is thus indirectly enabled to control his real estate, though unable directly to devise it, the guardianship drawing after it the custody of the land (c): and it is also observable that though the statute does not authorize the appointment of guardians to married children, the guardianship is not determined by subsequent marriage (d).

15. "The Wills Act, 1873," in providing by s. 7 that "no will made by any person under the age of twenty-

(a) *Hayes & Jarm. Wills*, 43, n. (i). In England, a soldier on active service, or a seaman at sea can, though a minor, make a will of personalty (In the goods of *Farquhar*, 4, No. Cms. 651. In the goods of *McMurdo*, L. R. 1 Prob. 540.)
(b) S. 8.

(c) *Bedell v. Constable*, Vaugh, 178.

(d) *Earl of Shaftesbury's case* cit. 3 Atk. 625; 2 P. W. 102; but see contra as to daughters, 1 Ves. 91, per Lord Hardwicke. 1 Jarm. Wills, 29.

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one years shall be valid," takes away from infants the power of appointing guardians conferred by the statute of Charles the Second, it being provided, by the interpretation clause of the new Act, that the term "Will" shall extend to a disposition by will or testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards, and Liveries and Tenures in capite, and knight's-service and purveyance, etc." (a).

16. The day of a person's birth is included in computing his age for testamentary purposes; which, coupled with the fact that the law does not generally recognize a fraction of a day, (*fractionem diei non recipit lex*), leads to the singular result that a person may, according to legal computation, attain his majority nearly two days before he has actually completed twenty-one years. Thus, a person born a minute before midnight of the 1st day of January, 1872, will attain his majority in the eye of the law, as soon as midnight of the 30th day of December, 1892, shall have arrived, though, in fact, a period of nearly forty-eight hours may intervene before he shall have actually completed his twenty-first year (b). It is laid down by the old writers that a male infant can make a will of personality on the last day of his fourteenth year, and that a female infant has the same power on the last day of her twelfth year (c).

(a) An infant has still, however, the right of appointing a guardian by deed under the old Act.

(b) *Hayes & Jarm, Wills*, 223, n. (c). *Grant v. Grant*, 4 Y. & C. Ex. 256. *Wright v. Mills*, 5 Jur. N. S.

771. *Edwards v. Reppinam*, 9 Ex. 628.

(c) *Swinb. Pt. 2, s. 2, pl. 7. Hert.* 2 *Torb. Sid. 262. Com. Dig.* *vise H. 2. Godolph. Pt. 1, c. 8, Bac. Ab. Wills, B. 2.*

CHAPTER IV.

OF DISABILITY FROM COVERTURE.

SECTION I.

Character and Consequences of this Disability.

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1. Classification of this disability.
2. Comparison of the Civil Law with the English Law.
3. Character of disability from coverture.
4. Character of disability from infancy.
5. Policy of recent legislation is to relieve married women from their disabilities.
6. Power of married woman to make a will of personalty.
7. Assent of the husband.
8. Effect of husband's death on wife's will made during coverture.
9. Power of married women to devise legal estate in her lands.
10. Power of wife to make a will whose husband is *civiliter mortuus*.
11. A married woman may make a will under a power.
12. A married woman, executrix, may bequeath property to which she is entitled as executrix.
13. Will of married woman not validated by death of husband during coverture.
14. Effect of 1st section of 32 Vict., c. 8, on wills of married women considered.
15. Case of *Noble v. Phelps* considered.
  - (a.) Deduction from *Price v. Parker*.
  - (b.) Case of *Thomas v. Jones* considered.
  - (c.) State of facts in that case.
  - (d.) Opinions of the Judges in *Thomas v. Jones*.
  - (e.) Married woman's testamentary capacity not directly enlarged by the Statute.
  - (f.) Enlargement of that capacity indirectly.
  - (g.) Married woman's will should, under the Statute, be construed to speak and take effect as if executed immediately before her death.
16. Twenty-seventh section of English Act not introduced by 32 Vict., c. 8.

1. The disability of coverture may properly be included in the second class of disabilities mentioned by Blackstone.

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2. A married woman had, under the Roman Civil Law,

BOOK II. the same power of testamentary disposition as a *feme*  
 CHAP. IV. *sole* (a). In England, however, a less liberal rule prevailed; for, as the English law gave to the husband, upon marriage, the wife's personal chattels, it was considered that it would be extremely inconsistent to give her the power of defeating that provision of the law by bequeathing those chattels to another; and the right of making a testament was therefore denied to her (b); and, as to real estate, married women were expressly excepted in the Statute (c) 34 & 35 H. 8, c. 5. The English Statute 1 Vict., c. 26, did not confer upon married women any greater testamentary capacity than they possessed before the passing of that Act (d).

3. The disability of coverture is of an anomalous character. It does not arise from natural infirmity (e). "A married woman," said the old law, "has a disposing mind but not a disposing power." "The mental and moral capacity of the wife," says Mr. Justice Adam Wilson, in a late case (f), were never questioned, for she was allowed to perform many acts requiring ability, discretion and judgment, during her coverture. She could execute a power disposing of property of unlimited value according to her own discretion, or act as agent and attorney for another in all matters of business requiring skill and judgment, as well where it was in the business of another as where it was in her own business, as in dealing with property settled to her separate use. She could perform a condition without the concurrence of her husband, as to convey an estate to J. S., which was devised to her on condition of so conveying, and she could

(a) 2 Black. Comm. 497.

(b) 1 Williams Exors. 51; Andrew Ognell's case, 4 Co. 51 b; 2 Black. Comm. 498.

(c) By s. 14.

(d) See s. 18.

(e) *Socket v. Wray*, 4 Bro. C. C. 486.

(f) *Wright v. Garden*, 28 U. C. Q. B. at p. 623.

make a will of her personalty with her husband's consent. She could also make a will as executrix against his consent; and she had absolute power to act as a *feme sole* during the exile or transportation of her husband. Before her marriage she could fill a great variety of offices (a). The legal fiction was, that her separate existence is not contemplated: it is merged by the coverture in that of her husband; and she is no more recognized than is the cestui que trust or the mortgagor, the legal estate, which is the only estate the law recognizes, being in others" (b).

4. The disability of infancy, on the other hand, is founded on an assumed want of capacity, and cannot be dispensed with at the pleasure of the contracting or disposing parties, so far, at least, as the *jus disponendi* is concerned (c); and any attempt to give a power of disposition to an idiot or lunatic would be clearly abortive (d).

5. The policy of recent legislation, dictated, to a great extent, by the liberal spirit of the Courts of Equity, has been to remove the disabilities incident to coverture, and to give married women a power of disposition over their own property.

6. Prior to the passing of the Canadian Statute 22 Vict., c. 34 (e), it was, and it still is, competent for a married woman to make a will of personalty, provided such will receives the assent of her husband, and provided also he survives her and does not disaffirm the will thus made (f). The assent given by the husband, however, does not expressly operate to give testamentary capacity, but operates merely as a renunciation by him of the right

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(a) See *The King v. Stubbs*, 2 T. R. 395-397; and Co. Litt. 326.

(b) Per Lord Brougham, C., in *Murray v. Barlee*, 3 M. & K. 220.

(c) *Hearle v. Greenbank*, 3 Atk. 397; 1 Ves. sen. 298.

(d) 1 Jarm. Wills, 33.

(e) Con. Stat. U. C., c. 73.

(f) *Mariot v. Kinaman*, Cro. Car. 219. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 75. *Tucker v. Inman*, 5 Scott N. R. 843; 4 M. & Gr. 1049, 1076.

BOOK II. which the law gave him to the administration of his  
 CHAP. IV. wife's personalty (a).

7. A general assent on the part of the husband is not sufficient; it is necessary that he should assent to the particular will which is set up (b). And the husband's consent may be implied from circumstances; though, if he has once expressly consented to a particular will, a revocation of such consent must be formal in order to be effectual. As the consent operates merely as a renunciation of the husband's right to administration (c), it was considered that he might revoke the consent either before or after the decease of the wife and before probate is granted (d). It has lately been held, however, that, when the husband has once assented after the wife's death, he cannot revoke his assent though probate has not been granted (e). Should the husband, by his conduct or acts, after the decease of his wife, induce the executor named by his wife to act under the will, he will be estopped from revoking his consent to the instrument (f). The husband must, however, have a full knowledge of his rights to render his consent binding (g).

8. The death of the husband before the wife extinguishes whatever support, authority or efficacy his wife's will might have derived from his concurrence (h); and, as the husband's consent is confined to the particular will,

(a) 2 Black. Comm. 498.

(b) *Rez v. Bettesworth*, 2 Str. 891.

(c) 1 Rep. husb. & wife, 170. *In the goods of Smith*, 1 S. & T. 127, per Sir C. Cresswell.

(d) Swinb. Pt. 2, s. 9, pl. 10. 1 Rep. husb. & wife, 170, by Jacob. 4 Burn, E. L. 52. *Brook v. Turner*, 1 Mod. 211, 2 Mod. 170.

(e) *Maas v. Sheffield*, 1 Rob. 364. 4 No. Cas. 350; 10 Jur. 417. See also Deane, Wills 65. *In the goods of*

*Reay*, 8 Jur. N. S. 596; 31 L. J. P. 154.

(f) 1 Williams Exors. 52. *Brook v. Turner*, 2 Mod. 170.

(g) *Badely v. Lyte*, per Sir C. Cresswell, Probate Ct., 16 Dec., 1859.

(h) *Noble v. Phelps*, L. R. 2 Prob. 283; 40 L. J. P. 60; 25 L. T. N. S. 65. 1 Williams Exors. 53. *Miller v. Brown*, 2 Hagg. 209. *Thomas v. Jones*, 2 J. & H. 475; 1 D. J. & S. 63; 8 Jur. N. S. 1224.

after acquired property will not by virtue of that consent, pass under it (a).

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9. No contract can enable a married woman to pass the legal estate in her lands at common law by an ordinary will; since, being excepted out of the Statute 34 & 35 H. 8, c. 5, she was, as we have seen, left subject to her pre-existing disabilities. Every will of a married woman, passing a legal estate, must operate as an appointment of an use; but a mere contract, before marriage, as to specified lands, will be sufficient to give the wife an equitable power to devise, and the legal estate must be obtained by conveyance from the heir (b).

10. The wife of a man, who is *civiliter mortuus*, being banished for life or attainted, or a convicted felon, is a *feme sole* as to the power of disposing by will, at least of property acquired after her husband's civil death or conviction (c).

11. A married woman may make a will, if a power to that effect be reserved to her in a settlement or other sufficient instrument executed by husband and wife before marriage (d). The chain of executorship is not continued by the appointment of an executor by a married woman in a will made under a power (e).

12. As the husband has no beneficial interest in the personal estate which the wife takes in the character of

(a) 1 Williams Exors. 53. *Stevens v. Bagwell*, 15 Ves. 156. *Price v. Parker*, 16 Sim. 198.

(b) 1 Jarm. Wills 33. *Wright v. Lord Cadogan*, 2 Ed. 239; and see *Churchill v. Dibben*, 9 Sim. 447, note. *Dillon v. Grace* 2 Sch. & Lef. 463.

(c) *In the goods of Coward*, 4 S. & T. 46; 11 Jur. N. S. 569; 34 L. J. P. 120; 13 L. T. N. S. 210. 1 Jarm. Wills 35. 2 Bright, husb. & wife, 39. *Countess of Portland v. Progers*, 2 Vern. 104. *Ex p. Frank*, 1 Moo. & S. 11. *In the goods of Martin*, 2 Rob. 405. 15 Jur. 686.

*Newsome v. Bowyer*, 3 P. W. 37. *Deerly v. Mazarine*, 1 Salk. 116; and see per Sir W. P. Wood, in *Davies v. Gough*, 2 Kay 627; and per Abbott, C.J., *Bullock v. Dodds*, 2 B. & Ald. 275.

(d) *Rich v. Cockel* 9 Ves. 375. *Hodsdon v. Lloyd*, 2 Bro. C. C. 534. The execution of powers by married woman is too extensive a subject to be treated of in this work, and the reader is, therefore, referred to the treatises on the subject of powers.

(e) *In the goods of Hughes*, 4 S. & T. 209; 29 L. J. P. 165.

BOOK II. executrix, and as the law permits her to take upon herself  
 CHAP. IV. that office, it has always been competent for her, in excep-  
 tion to the general rule that a married woman could not  
 dispose of property, to make a will in this instance with-  
 out the consent of her husband, restricted, however, to  
 those articles to which she was entitled as executrix.  
 The effect of such an instrument was merely to pass, by a  
 pure right of representation to the testator or prior owner,  
 such of his personal assets as remained outstanding, and  
 no beneficial interest which the wife might have in any  
 part of them (a).

13. The will of a married woman, made during cover-  
 ture, is not rendered valid by the death of her husband,  
 unless subsequently republished by her (b). When the  
 husband of the testatrix had not been heard of for seven  
 years, probate was granted as if she had died a widow (c).

14. It is important to consider the effect upon the will  
 of a married woman, of the 1st section of the recent On-  
 tario Statute, 32 Vict., c. 8. That section, which has been  
 adopted from the 24th section of the English Statute, 1  
 Vict. c. 26, provides that "Every will shall be construed  
 with reference to the real and personal estate comprised  
 in it, to speak and take effect as if it had been executed  
 immediately before the death of the testator, unless a con-  
 trary intention shall appear by the will."

15. In *Noble v. Phelps* (d) the effect of the 24th section  
 of the English Act upon property acquired by a married  
 woman after the date of a will made by her, was fully con-  
 sidered. Lord Penzance said (e), "Does the will of a mar-

(a) 1 Williams Exors. 51-52.  
*Scammell v. Wilkinson*, 2 East 552.  
 1 Rep. husb. & wife, 2nd Ed. 188-  
 189. *Tucker v. Inman*, 4 M. & Gr.  
 1076. *Hodsdon v. Lloyd*, 2 Bro. C. C.  
 534-543; 2 East, 556-557. *Stevens*  
*v. Bagwell*, 15 Ves. 139.

(b) *In the goods of Wollaston*, 12

W. R. 18; 9 Jur. N. S. 727; 32 L.  
 J. P. 171.

(c) *In the goods of How*, 1 S. & T.  
 53; 4 Jur. N. S. 366.

(d) L. R. 2 Prob. 276; 40 L. J.  
 P. 60; 25 L. T. N. S. 165.

(e) At page 283.



ried woman, made during coverture, speak and take effect with reference to the property comprised in it, as if it had been executed immediately before her death, in this sense that the will operates upon all property over which the testatrix had a disposing power at the time of her death, though she may not have had that power at the time of making her will ?

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(a) The case of *Price v. Parker* (a) is conclusive to show that the statute does not confer on a married woman the power to make a will (b). There the wife had a power of appointment over certain property in case she died before her husband. Whilst her husband was yet living she made her will. At this time the event, upon the occurrence of which alone a power of appointment was conferred upon her, had not happened, and indeed it never did happen, for her husband died first. Consequently the will was inoperative, and so said the Court. "The effect of the 24th section of the Wills Act," said the Vice-Chancellor, "is not to make that valid which was invalid in its inception, but to give a rule for the construction of a valid testamentary instrument."

(b) The nature and extent of the operation which the 24th section of the Wills Act has upon the will of a married woman, appears to me to have been settled and defined by the very able judgments delivered in the case of *Thomas v. Jones* (c), a case which was fully and ably argued, first before Lord Hatherley as Vice-Chancellor, and again upon appeal in Chancery before Lord Westbury.

(c) In that case this was the state of facts: a married woman had made her will during coverture, and died with-

(a) 16 Sim. 198.

(b) "The Wills Act, 1873" confers on married women full testamentary powers, so that it is conceived the question raised in *Noble v. Phelps* cannot arise upon any

will made on or after the 1st day of January, 1874.

(c) 2 J. & H. 475; 31 L. J. Ch. 732; 1 D. J. & S. 63; 32 L. J. Ch. 139; 8 Jur. N. S. 1224.

BOOK II. out re-executing it. Her husband survived her. At the  
CHAP. IV. time of the execution of her will, she was the contingent donee of a power of appointment: that is to say, a power of appointment had been conferred upon the survivor of three persons of whom she was one, and of whom she eventually turned out to be the survivor. Her will contained no distinct appointment referring to the power or any specific gift of the property which was the subject of the power. But it did contain a general residuary devise. The testatrix therefore continued under the disabilities of coverture up to the time of her death. On the other hand, before her death, but after the making of her will, she became by survivorship the donee of a power of appointment of which the general residuary devise in her will was, if the 27th section of the Wills Act could be resorted to, a sufficient exercise. It seems to have been considered, indeed, by Lord Westbury, but not by Lord Hatherley, that a will made by the testatrix before she became the survivor would, independently of the Statute, have been a good execution of the power if conceived in apt language for the purpose. But this, he said, it was not necessary to decide, as the language of the residuary devise was too general so to operate.

(d) For the purpose of deciding the case, therefore, both these learned judges were of opinion that the testatrix, at the time when she made her will, had no disposing power over or in relation to the property in question, though she acquired such disposing power before her death. And in this state of things they both held that, by force of s. 24 of the Statute her will must be considered to take effect as if made immediately before her death, that at that time, she had full power of disposition over the property in dispute, and that her will, in consequence, effectually disposed of it.

(e) Now, I observe that both the learned judges appear, from their observations, to guard themselves from the conclusion that, by so deciding, it was intended to be asserted that what is called the testamentary capacity of a married woman would be increased or enlarged by the Statute. If by testamentary capacity, is meant the right and power to make a valid will, it is a power that admits of no degree—it can neither be enlarged nor narrowed—a person either has it or has it not, and, that it is not conferred by the Statute, I have already pointed out. On the other hand, if the words “*testamentary capacity*” be referred to the property, which, in any individual case, is capable of being disposed of by will, it is obvious that such a capacity will vary and increase with the extent of property over which the individual may acquire, from time to time, and from any source, a disposing power.

(f) Understanding the words in this sense, it is, I think, impossible to affirm that the effect produced by s. 24 as it was applied by the court in the case of *Thomas v. Jones* (a) was anything short of an enlargement of the testamentary capacity of the testatrix, not indeed by directly conferring an enlarged capacity upon her, but by referring the date of her will to a time when she possessed that enlarged capacity from another source. Lord Westbury puts it thus: ‘To render, however, the will of Margaretta, made in 1838, a valid appointment by way of devise of the estates in question under the Statute, it is still necessary that Margaretta should have had, at the time of her decease, full right and power to make such a testamentary appointment without the aid of the statute. This she undoubtedly had, and her will, by being made to speak at the time of her death, still depends for its operation on the

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SECT. I.

(a) 2 J. & H. 475; 31 L. J. Ch. 732; 8 Jur. N. S. 1224.  
1 D. J. & S. 63; 32 L. J. Ch. 139;

BOOK II. extent of her then existing testamentary authority; and  
 CHAP. IV. Lord Hatherley says, 'The Statute makes a will operate  
 Sect. I. as if executed immediately before the death, and the effect  
 of this is, in the case of a married woman, that she must  
 be regarded as a married woman executing the instrument  
 immediately before her death, and passing thereby every-  
 thing of which at the time of her death she had acquired  
 a power of disposing.'

(g) The substance, therefore, of what was in this case affirmed I take to be, that ss. 24 and 27 apply to the wills of married women in the same manner as to those of other persons. That, consequently, the will of a married woman ought to be considered to speak and take effect as if executed immediately before death. That, in so considering it, the disposing powers of the testatrix must be accepted such as they existed at that time. That if the result of thus regarding the will is to enlarge the extent of property upon which the will operates beyond that upon which it would have operated at the time it was made, this result would not be correctly described as conferring a validity upon the will other than that which it had by law without the Statute, and consequently is not at variance with a Statute. If I were called upon then to apply these principles to this case, I should, as it seems to me, be warranted in holding that the testatrix, having full power over the property acquired from her husband, at the time of her death, and having used language in her will sufficiently large to include it, has effectually disposed of that property."

16. The 27th section of the English Act had not, prior to the passing of "The Wills Act, 1873," been introduced into the law of this Province, though, as before observed we had adopted the provisions of the 24th section.

#### NOTE TO SECTION I.

The author has, in the foregoing section, assumed, in the absence of any express authority to the contrary, that the common law right of

## SECTION II.

*Of a married woman's power to dispose by will of property settled to her separate use.*

1. Origin of the doctrine of separate use.
2. Extension of the doctrine by late cases.
3. Rights of wife separated from her husband under special agreement.

a married woman to make a will of her personality with the assent of her husband still exists. It is more than doubtful, however, whether such is, in fact, the case. By Con. Stat. U. C., c. 73, s. 16, it is provided that from and after the 4th day of May, 1859, and hereafter, every married woman may, by devise or bequest executed in the presence of two or more witnesses, neither of whom is her husband, make any devise or bequest of her *separate property*, real or personal, or of any rights therein, whether such property was or be acquired before or after marriage, to or among her child or children, issue of any marriage, and failing there being any issue, then to her husband or as she may see fit, in the same manner as if she were sole and unmarried. The word *separate* used in this Act is calculated to create much difficulty. For the reasons given in the text at page 42, it seems clear the expression "*separate property*" used in the 16th section, means no more than "*property*" simply. It is not property in the nature of *separate estate*; (see *The Royal Canadian Bank v. Mitchell*, 14 Grant, 412; *Chamberlain v. McDonald*, 14 Grant, 447; and *Mitchell v. Weir*, 19 Grant, 568); and can therefore only mean property "owned" by a married woman in the ordinary sense of that term. Indeed in *Mitchell v. Weir*, V.-C. Strong assumes that the personal estate of the testatrix derived by her under the will of her father, and held in no special or peculiar manner, was within the description of property of which a married woman is enabled, by the Act, to dispose by will; and V.-C. Mowat, in *Chamberlain v. McDonald*, used language, from which it may be inferred that he considers the words "*separate property*" in the

Act to mean no more than the word "*property*." He says (at p. 449), "I may observe that I see great difficulty in holding that a married woman has, under the Act, *nojus disponendi*, except by will, of her *personal property*." On the other hand, however, the Chancellor, in *The Royal Canadian Bank v. Mitchell*, avoids giving any opinion as to the meaning of the words, "*separate property*" in the Act. He says (at p. 419): "What the Legislature meant by *separate property*, it is not necessary to inquire." And V.-C. Strong, in *Mitchell v. Weir*, calls the *separate property* referred to in the Act, "*the creature of the Statute*," and speaks of it as "*this Parliamentary property*." The statute does not, it will be observed, expressly abrogate the common law right of a married woman to make a will with the assent of her husband; but if that right is not abrogated, there must co-exist in the married woman the two powers—one of disposing by will with the assent of the husband, a power which was not limited as to the objects of the testatrix's bounty;—the other—of disposing by will in the limited manner prescribed by the 16th section. Assuming the view taken above of the meaning of the words "*separate property*," used in the 16th section, to be correct, it seems impossible that the Common Law and the Statutory powers can co-exist. Amongst other reasons, it may be observed that one of the objects of the statute plainly was, to secure the property of a married woman to her children, an object which would clearly be defeated by permitting her to make a will under the old law. The case of *Mitchell v. Weir* (sup.), cited fully at p. 44, is conclusive to show that the property referred to in the 16th

4. Right to devise separate property still a valuable priv
5. Woman deserted by her husband may bequeath her property acquired under order of protection.
- n. (b) Circumstances under which property acquired by a woman separated from her husband, will be considered her separate estate.

BOOK II. 1. The right of married women to the enjoyment of  
 CHAP. IV. property settled to their separate use, having been  
 Sect. II.

section cannot be bequeathed, except in the manner mentioned in that section. V.-C. Strong observes (at p. 44), "I think the construction of this clause leaves no room for doubt that the right to devise or bequeath to the husband or otherwise *only arose in default of issue*, 'failing such issue,' as the words are. Any other construction would completely silence those words just quoted. This being so, it could not be contended that separate property under this Act in the face of the direct enactment contained in the clause referred to, could, as at common law, be at the free disposal of a married woman by a will executed with the assent of her husband . . . . I think it equally clear that a married woman, in respect of separate property under this Act, has no authority to deal with her personalty by will as she may with personalty so settled as to be her separate estate in equity."

It will be useful, in considering the effect of the statute, to bear in mind the true nature of *what is called* a married woman's will at Common Law. The fact is, that a married woman had *no power to make a will*. Macqueen observes (Macq. Husb. and Wife, 317 n. (b.)) "A married woman cannot make a will. But her husband may waive the interest which the law gives him in her personal property to the effect of enabling her to bequeath it." And Roper thus lays down the law (1 Rop. Husb. and Wife, 169), "He (the husband) may also empower her to make a will to dispose of her personal estate. The principle upon which the power of the wife is founded is this, that her husband may waive the interest which the law secures to him in her property by disabling her from disposing of it during the marriage."

And it is laid down by Williams Exors. 533, that the assent on the part of the husband is no more than a waiver of her rights as his wife's administrator. These rights were, in explanation of Williams, in his work on Executors (at p. 1376). "It has been said," he says, "that the husband is entitled to the grant of administration to his wife's effects, and consequently, before the Statute of Distributions, he was entitled to administer. If administrators were, to the enjoyment of the residue. However, arose whether the husband's right was superseded by the force of that Statute, and he was not thereby bound to contribute her personal estate to her next of kin; to remedy is provided by 29 Car. II. c. 3 that neither the Statute of Distributions, or anything therein contained, shall be construed to extend to the estates of *femes covertes* that are intestate; but that their next of kin may demand and have addition of their rights, credits, and personal estates, and receive and enjoy the same as they might have done before the said Act."

At the time, therefore, of the passing of the Act 22 Vict. c. 34 (Con. Stat. c. 73) was passed, the law was thus:

A married woman could not make a will. Her husband was entitled to her personal property at her death to her outstanding property for his own use and disposal. This right he might waive, to the effect, as Macqueen expresses it, of enabling her to bequeath her personal property. His wife's chattels personal in property became the husband's by the marriage.

By s. 17 of Con. Stat. U. it is provided that the separate

by the Court of Chancery, that Court took care to secure to them the incidents of absolute ownership over such property, including the power of testamentary disposition. In the case of *Fettyplace v. Gorges* (a), decided nearly a century ago, the right of a married woman to dispose by will of personal property, settled to her separate use, was expressly recognized. In that case, Lord Thurlow remarked: "I have always thought it settled that, from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it. Upon the cases, I have always taken this ground, that personal property, the moment it can be enjoyed, must be enjoyed with all its incidents."

2. The same doctrine was, after some hesitation in the earlier cases (b), applied to real estate devised to trustees in trust for the separate use of a married woman, in the recent case of *Taylor v. Meade* (c). In that case, Lord Westbury, after reviewing the authorities, remarked: "I must hold, therefore, that a feme covert, not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument, *inter vivos* or will" (d). And in the case of

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sonal property of a married woman, dying intestate, shall be distributed in the same proportions between her husband and children, as the personal property of a husband dying intestate is to be distributed between his wife and children, and if there be no child or children living at the death of the wife so dying intestate, then such property shall pass or be distributed as if this Act had not been passed." This section is a direct inroad upon the husband's rights; and when a wife dies intestate, leaving children, he no longer is entitled to her personality absolutely. He has nothing to waive, therefore, in such a case, except the interest which he takes under the Act; and this interest he acquires, not, as formerly,

by virtue of his right to administration, but from the Statute.

The foundation, therefore, of the married woman's common law right to dispose of her personality by will, seems to be taken away by the 17th section of the Act.

If she has no children, she is empowered by the Act to bequeath her property as she pleases.

(a) 1 Vea. 46.

(b) *Harris v. Mott*, 14 Beav. 170. *Lechmere v. Broderidge*, 32 Beav. 353. *Blatchford v. Woolley*, 2 Dr. & S. 206, per V. C. Kindersley.

(c) 11 Jur. N. S. 166; 13 W. 394; 5 N. R. 348; 34 L. J. Ch. 203.

(d) See also *Troutbeck v. Boughey*, L. R. 2 Eq. 534.

BOOK II. *Hall v. Waterhouse* (a), V.-C. Stuart held that a devise of  
 CHAP. IV. real estate, without the interposition of trustees, to a mar-  
 Sect. II. ried woman and her heirs for her separate use, free from marital control, gave her a right of disposition over the equitable fee in the same manner as if she were discoverte, and that the heir-at-law would be a trustee of the legal estate for her devisee (b).

3. In a case where husband and wife lived separately, having entered into an agreement whereby it was agreed that their furniture and effects should be divided and that the wife should maintain herself, and that her husband should allow her to enjoy her earnings for her separate use, and that neither should interfere with the other, it was held that the property acquired by the wife after the separation became her separate property, and as such might be bequeathed by her (c). These, and a strong array of other cases, have firmly and clearly established the equitable right of a married woman to dispose by will of real and personal property settled to her separate use (d).

#### 4. The right of testamentary disposition given to ma

(a) 5 Giff. 64; 11 Jur. N. S. 361.

(b) See also *In the goods of Smith*, 1 S. & T. 125; 4 Jur. N. S. 1193. *Braham v. Burchell*, 3 Add. 263. See *Adams v. Gamble*, 12 Ir. Ch. Rep. 102; and *Lechmere v. Brotherhood*, 32 Beav. 353, as to the power of a married woman to convey by deed, without acknowledgment, real estate settled to her separate use.

(c) *Haddon v. Fladgate*, 1 S. & T. 48; 27 L. J. P. 21. *In the goods of Smith*, 1 S. & T. 125; 4 Jur. N. S. 1193. See also the recent case of *Pride v. Bubb*, L. R. 7 Ch. Ap. 64, in which it was held by Hatherley, L. C., that when real estate was vested in trustees for the separate use of a married woman, under the provisions of a deed of separation duly executed by her husband and herself, she had a good power of disposition by will or deed unacknowledged.

(d) See the following cases on subject of the powers of married women with respect to property tiled to their separate use:—*Pea v. Monk*, 2 Ves. sen. 191. *Ric Cockell*, 9 Ves. 369. *Hulme v. Ter* 1 Bro. C. C. 16. *Wagstaff v. S* 9 Ves. 520. *Socket v. Wray*, 4 C. C. 487. *Sturges v. Corp*. 13 192. *Essex v. Atkins*, 14 Ves. *Heatley v. Thomas*, 15 Ves. *Dalbrac v. Dalbrac*, 16 Ves. *Bullpin v. Clarke*, 17 Ves. *Power v. Bailey*, 1 Ball & J 49. *Greatly v. Noble*, 3 M. *Stuart v. Lord Kirkwall*, it *Aguilar v. Aguilar*, 5 M. *Howard v. Damiani*, 2 Jac. 458. *Acton v. White*, 1 Sim. 429. *Braham v. Burchell*, 263.



ried women by Con. Stat. U. C., c. 73, to which we shall presently advert, being limited, the *jus disponendi* created by the English Courts of Equity was, after the passing of that Act, still a valuable privilege.

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5. A woman, deserted by her husband, having obtained an order of protection under the provisions of the 6th section of c. 73 of Con. Stat. U. C., would, it is conceived, have had a right to dispose, by will, of her savings acquired during such desertion; and the right would extend to all savings during the desertion, though acquired prior to the date of the order of protection (a). So, also, a married woman, having a decree for alimony, may dispose by will, as against her husband, of her savings thereout, in the same manner as if she were a feme sole (b).

### SECTION. III.

*Of the power to will their property conferred on married women by Con. Stat. U. C., c. 73; 35 Vict., c. 16, and 36 Vict., c. 20.*

1. Provisions of Con. Stat. U. C., c. 73.
2. Construction of this Act in *Royal Canadian Bank v. Mitchell*.
3. Particulars of that case.
4. Opinions of V.-C. Mowat and A. Wilson, J., as to effect of the Act on wife's personalty.
5. Remarks on judgment in *Wright v. Garden*.
6. Conclusion to be derived from the cases on the Act.  
n. (a) Case of *Mitchell v. Weir* fully stated. Direct authority on 16th section.
7. Limitation of married woman's power to devise under the 16th section.
8. Provisions of the "Married Woman's Property Act, 1872," (35 Vict., c. 16.)
9. Effect of 1st section of that Act.

(a) In the goods of *Elliott*, L. R. 2 Prob. 374; 40 L. J. P. 76; 25 L. T. N. S. 203. In the goods of *Farraday*, 7 Jur. N. S. 1252; 2 S. & T. 369; 31 L. J. P. 7.

(b) *Moore v. Barber*, 11 Jur. N. S. 539; 12 L. T. N. S. 664; 5 Giff. 43. As to property acquired by a

married woman, voluntarily separated from her husband, and the circumstances under which it will be considered her separate property, see *Haddon v. Fladgate*, 1 S. & T. 48; 27 L. J. P. 21; 6 W. R. 456; and the cases there cited.

10. Effect of 2nd section.

11. Disability of married women to dispose of their property by will removed by "The Wills Act, 1873."

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1. The "Act respecting certain separate rights of property in Married Women," (Con, Stat. U. C., c. 73), provides by s. 1 that "Every woman, who has married since the fourth day of May, 1859, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may notwithstanding her coverture, have, hold and enjoy all her real and personal property, whether belonging to her before marriage, or acquired by her by inheritance, devise, bequest or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband and from his control or disposition without her consent in as full and ample a manner as if she continued sole and unmarried, any law, usage, or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture." S. 16 provides that "From and after the said fourth day of May, 1859, and hereafter, every married woman may, by devise or bequest executed in the presence of two or more witnesses, neither of whom is her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was or be acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she may see fit, in the same manner as if she were sole and unmarried; but her husband shall not be deprived by such devise or bequest of any right he may have acquired as tenant by the curtesy."

2. The effect of the Married Woman's Act is thus stated

by the present learned Chancellor of Ontario (a): "The general scope and tenor of the Act is to protect and free from liability the property, real and personal, of married women; not to subject it to fresh liabilities, except in the case of her torts and of her debts and contracts before marriage. The change made in the 14th section applies with peculiar force to the case before me. It is an unmistakable manifestation of intention that the separate estate of married women shall be liable only upon debts incurred or contracts made before marriage. What the Legislature meant by *separate property* it is not necessary to enquire." And he further says (b): "My construction of the Married Woman's Act is, that it gives to what Lord Westbury calls the ordinary 'equitable estate of a feme covert' certain qualities for its better protection, which it did not possess before, such qualities being incident to a separate estate, and sufficient, probably, if found in a private instrument, to constitute a separate estate; but that upon a proper construction of the whole Act, certain qualities incident to a separate estate are withheld, and, what is all-important, among them, that quality upon which the decisions making the separate property liable for the married woman's contracts, is founded." The "quality" referred to by the Chancellor was the *jus disponendi* independently of the husband.

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3. The case of *The Royal Canadian Bank v. Mitchell* was decided upon a bill filed to obtain equitable execution against certain lands held in trust for a married woman, one of the defendants; and though the language of the Court in that case is general, and applies both to *real and personal* estate, yet, in subsequent cases, doubts have been expressed whether the *personal estate* of a married woman

(a) *Royal Canadian Bank v. Mitchell*, 14 Grant, at p. 419.

(b) At p. 420.

BOOK II. is not, in fact, made by the Act separate estate in the ordinary sense.
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SECT. III. 4. In *Chamberlain v. McDonald* (a), V.-C. Mowat said, "I may observe that I see great difficulty in holding that a married woman has, under the Act, no *jus disponendi*, except by *will*, of her personal property." And in *Wright v. Garden* (b), Adam Wilson, J., thus expressed his opinion as to the effect of the Act upon a married woman's personal estate: "I am of opinion the *personal separate* estate is at the complete disposal of the wife in this country, as it is at her disposal in the Courts of Equity in England." In the case of *Wright v. Garden*, however, Mr. Justice Wilson differed in opinion on the construction of the Act from the majority of the Court, by whom the decision in *The Royal Canadian Bank v. Mitchell* was expressly approved.

5. It will be observed that the learned judge uses the word "*separate*." This word has a technical meaning which he explains in his judgment (c). Referring to the provisions of the Act under consideration he says: "The real estate, which is called her *separate* property, she cannot sell or lease without the consent and concurrence of her husband. It is not, therefore, properly *separate estate* at all, as it wants the principal element and characteristic of it, the power of disposition over it without the control or interference of the husband, just as if she were still a single woman." It will be remarked that the committee, whose report is referred to at p. 619, recommend that power be given to married women "to hold *separate* property at law as they now may in equity;" and the argument of the learned judge is directed to prove that such was in fact the effect of the provisions of Con. Stat. U.

(a) 14 Grant, at p. 449.

(b) 28 U. C. Q. B., at p. 624.

(c) At p. 617.

C., c. 73, and that married women had, therefore, at law, power to contract so as to bind such property, and make it responsible for the fulfilment of their contracts. The word "*separate*" is improperly used in the Act, and is no doubt used by the learned judge in stating his conclusion merely in the sense in which it is used in the Act.

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6. Notwithstanding the opinions expressed by V.-C. Mowat and Mr. Justice A. Wilson, with regard to the effect of the provisions of the Act upon the personal estate of a married woman, it must be assumed that the cases referred to establish the argument that the personal property of a married woman is not, by the Act, made *separate estate* in the sense in which that term is understood by Courts of Equity. It is remarkable that no reference is made in any of the arguments to the enabling character of the provisions of the 16th section. If it was intended by the Act to make a married woman's property *separate estate*, it is difficult to see the necessity for passing an enabling clause creating a less extensive power of disposition than was, before the passing of the Act, attached to *separate estate* by Courts of Equity. There would have been a manifest inconsistency in providing that property, over which the married woman possessed a substantially unlimited power of testamentary disposition, might be willed by her to her children, etc. The enabling provisions of the 16th section, it is conceived, supply, in themselves, a strong argument in favour of the view of the Act taken by the Courts. Even assuming, however, that it was the intention of the Legislature, by the Act in question, to make a married woman's property *separate estate*, it seems clear that it must also have been the intention of the Act to withhold from married women the absolute power of disposition by will which is attached to that estate by Courts of Equity. The terms of the 16th

BOOK II. section exclude the idea of a greater power of testamentary
 CHAP. IV. disposition having been intended to be conferred, than
 SECT. III. that given by this section. Whatever, therefore, may be
 the true general construction of the Act, it is clear that
 a married woman obtained by it only the limited power
 of testamentary disposition which is created by the 16th
 section (a).

(a) Since the text of this book was written, the case of *Mitchell v. Weir*, 19 Grant, 568, has established the correctness of the construction put by the author upon section 16 of Con. Stat. U. C., c. 73. It was argued in that case that the Statute makes a difference between the wife's real and personal estate, and that she is entitled under the Act to dispose of the latter absolutely; and the cases of *Lett v. The Commercial Bank*, 24 U. C. Q. B., 552; *Wright v. Garden*, 28 U. C. Q. B., 609; and *The Royal Canadian Bank v. Mitchell*, 14 Grant, 412, were cited in support of this argument. The Court however, held otherwise. The judgment of V.-C. Strong is very valuable, as throwing much light on this obscurely-worded Statute. He says: "This bill is filed to obtain a declaration as to the validity of certain bequests contained in the will of Elizabeth Mitchell, who died on the 9th day of June, 1870, having been married in the year 1869. The bill is filed by the husband and executor of the testatrix, who left surviving her one child, the infant defendant, Mary Georgina Mitchell. The testatrix who was entitled to considerable personal estate under the will of her father, devised and bequeathed all her estate, real and personal, to her husband, the plaintiff (who alone has proved the will), and certain other trustees and executors, who have all renounced, upon trust to convert the same forthwith, and out of the proceeds, after paying in the first place a legacy of \$10,000 to her child, the infant defendant; she gave \$10,000 to her husband, the plaintiff, and certain other legacies to persons named, and then the ultimate residue to be divided amongst the defendants, her brothers and sisters. The will does not upon its face purport to have been authorized by the

testatrix's husband, nor is there any evidence that it was so authorized, although the plaintiff has proved it in the Surrogate Court.

It has been argued before me on behalf of the infant defendant, that this will, so far as it gives legacies to persons other than this infant daughter of the testatrix, is void, inasmuch as the testatrix had no power to bequeath personalty, otherwise than in the manner prescribed by section 16 of Consol. Stat. of U. C. 22 Vict., ch. 73, which authorizes a married woman to make a will leaving her property to her child or children, and in default of issue to her husband, or as she may see fit, as if she was sole and unmarried. I think the construction of this clause leaves no room for doubt that the right to devise or bequeath to the husband or otherwise, only arose in default of issue; "failing such issue," as the words are. Any other construction would completely silence these words just quoted. This being so, it could not be contended that separate property under this Act in the face of the direct enactment contained in the clause referred to, could as at common law, be at the free disposal of a married woman by a will executed with the assent of her husband; and, although the contrary was very properly and ably argued by Mr. Laah for the residuary legatees, I think it equally clear that a married woman in respect of separate property under this Act, has no authority to deal with her personalty by will, as she may with personalty so settled as to be her separate estate in equity. The property of the wife under this Act is altogether the creature of the statute; and the married woman's power of disposition in respect of this parliamentary property must be ascertained from the statute itself,

7. The Act did not authorize a married woman, if she had children, issue of any marriage, to devise or bequeath her property to any other persons; and it was only in the event of her having no children, that she might leave her property as she pleased (a). It is doubtful whether she had power under the Act to give to one child a greater share than to another, as the words "unto and amongst," occurring in a will, have been held to give to devisees a tenancy in common in equal shares (b).

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and the common law can in no way apply, except where the statute is silent. Further, there is no analogy between the power of disposition of a woman having separate estate in equity, with no fetter on her power of alienation, for here, as I construe section 16, there is an express restriction of the power of bequeathing, and if a like limitation were contained in a declaration of trust to the separate use of a *feme covert*, it would have a like effect.

I find no cases decided bearing on this point, which I confess, although a case of the first impression, seems to me so clear as to require no authority. The cases on the other clauses of the Act have not much bearing on this question. The principle to be followed in construing the statute is, however, very clearly put by high authority in the case of *Kramer v. Glass*, where Draper, C.J., says:—"Every provision for these purposes is a departure from the common law, and so far as it is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give."

I am of opinion, therefore, that the will, in so far as it dealt with the residue left, after deducting the \$10,000 bequeathed to the infant defendant, is absolutely void, and that this residue therefore falls to be distributed under the provisions of section 17, which provides that it shall be divided between the husband and child, in the proportion of

one-third to the husband and two-thirds to the child.

It is however argued that the husband has disentitled himself to insist on his rights under section 17, by reason of his having proved the will.

I am also against this contention in support of which *Ex parte Fane* was cited. I do not regard that case as an authority for the proposition of the residuary legatees. There the husband taking probate was held to have placed himself in the same position as if he had authorized the will *a priori*, in which case the will would have been good; but in the present case no assent of the husband could have authorized this will. So far as it relates to the bequests of residue, it was a disposition which the married woman was positively forbidden to make by Act of Parliament, and being a nullity from the beginning, is not susceptible of confirmation. Therefore *Ex parte Fane* does not apply, and there is no pretence for saying, and it is not argued, that the husband was bound to elect, or that he has by conduct given the legatees any equity against him.

I must, therefore, declare the will void as to all dispositions contained in it, *ultra* the legacy to the infant, and that the residue is to be distributed as on an intestacy.

(a) *Mitchell v. Weir*, sup. See the observations of Mr. Leith, as to the effect of the 16th section of the Act. Leith's R. P. Stat., 283, 784.

(b) *Richardson v. Richardson*, 14 Sim. 526. These words are very similar to the words "to or among" used in the Act. See also 2 Jarm. Wills, 238. *Campbell v. Campbell*, 4 Bro. C. C. 15.

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8. We have now to consider the effect of the "Married Woman's Property Act, 1872," (a), the provisions of which have been mainly adopted from the English Statute, 38 and 34 Vict., c. 93. It is provided by s. 1, that "After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall, without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a feme sole." Section 2 enacts that "All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds and profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, moneys or property shall hereafter be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman and disposed of without her husband's consent, as fully as if she were a feme sole: and no order for protection shall hereafter become necessary in respect of any of such earnings or acquisitions, and the possession, whether actual or constructive, of the husband, of any personal property of any married woman, shall not render the same liable for his debts."

9. There seems to exist no room for doubt that the effect of the 1st section of the Act is to give to married

(a) 35 Vict., c. 16.

women an absolute power of disposing, either by will or otherwise, of the equitable title to their real estate. Such real estate is, by the Act, made *separate estate* in the fullest sense; and, this being so, it is conceived that the married woman acquires in respect of it, all the privileges attached to such estate by Courts of Equity.

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10. The same remarks are applicable to the various classes of property mentioned in the 2nd section, but it is to be observed that the *general personal property* of a married woman is not included in the 2nd section, nor does there occur in the Act any provision (a) making such property *separate estate* in the ordinary sense. In respect of such property, therefore, it is conceived that a married woman has, at present, no greater statutory power of disposition by will than was conferred by Con. Stat. U. C., c. 73.

11. After the 31st December, 1873, a married woman will, it is conceived, enjoy the same absolute power of testamentary disposition in this Province as a feme sole. S. 5 of "The Wills Act, 1873," enables *every person* to devise, bequeath or dispose of by will all real and personal estate which he shall be entitled to, etc., and s. 4 provides that the terms "person" and "testator," shall include "a married woman." The provisions of the 8th section of the English Act, 1 Vict., c. 26, disabling married women, are not to be found in our new Act, which may, therefore, be regarded as a complete emancipation of married women from the testamentary disabilities to which they have so long been subjected.

(a) See the English Statute, 33-34 Vict., c. 93, s. 7.

CHAPTER V.

OF DEAFNESS, DUMBNESS AND BLINDNESS CONSIDERED AS DISABILITIES.

1. Deaf and dumb persons formerly considered *prima facie* incapable of making a will. Relaxation of this rule.
2. Proof required of the will of a deaf-mute.
3. Person born deaf, dumb and blind regarded by Blackstone as absolutely incapable of making a will.
4. Persons deprived of hearing and sight, if instructed, thought to be capable.
5. Blind persons not incapable. Necessity for proof of knowledge and approval of contents required in such cases.

BOOK II. 1. Deaf and dumb persons were formerly considered by
CHAP. V. the English law as *prima facie* incapable of making a will (a); but, when it was shewn that these infirmities were not congenital with the testator, and he could at one time write or speak, or had understanding, he was held capable of making a will (b); and since this class of persons have been educated, and rendered capable of communicating their ideas by signs and by writing, it seems reasonable that the rule presuming disability should be relaxed (c).

2. Where a deaf-mute communicates his will by signs to another, who writes it down, the nature of the signs and motions of communication must be shewn, in order that the Court may judge whether or not they were properly construed by the writer (d).

(a) 1 Williams Exors. 16.

(b) 1 Redf. Wills, 51—53. Godolph. Pt. 1, c. 11. 1 Williams Exors. 16. 1 Jarm. Wills, 29. Dickinson v. Blissett, 1 Dick. 268. In the goods of Harper, 6 M. & Gr. 731; 7 Scott N. B. 431.

(c) 1 Redf. Wills, 51—53. See

also Swinb. Pt. 2, s. 10, pl. 2. Godolph. Pt. 1, c. 11. Harrod v. Harrod, 1 Kay & J. 4.

(d) In the goods of Ouston, 2 S. & T. 461; 31 L. J. P. 177; 6 L. T. N. S. 368. In the goods of Geale, 3 S. & T. 430; 33 L. J. P. 126.

3. It is laid down by Blackstone that a man who is born deaf, blind and dumb is looked upon by the law as in the same state with an idiot: he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas (*a*); and, this being so, he is incapable of having animum testandi, and his testament is therefore void (*b*).

4. There seems to be no good reason why a person, though deprived of hearing and sight, having, by the assistance of modern art, received instruction so as to comprehend the nature of the transaction, should not be competent to execute a will. All that would be requisite in such a case, is, that the proper communication should be made from the testator to the witnesses, so that they might be able to depose to the act having been understandingly done (*c*).

5. Blind persons labour under no absolute testamentary incapacity. It has been considered essential, however, that where persons incapable of reading—whether from defect of sight or otherwise—desire to execute instruments which require attestation, such instruments should be read over in the presence of the witnesses and the person executing, in order to afford the fullest assurance of the execution being made with knowledge of the contents; and such was, in fact, the rule of the civil law (*d*). But such is not now the English law, which only requires proof of the testator's knowledge and approval of the contents of the instrument which he executed (*e*), and does not demand evidence that the paper was actually read over to the testator (*f*).

(a) 1 Black. Comm. 304.

(b) 2 Black. Comm. 497.

(c) 1 Redf. Wills, 54-55.

(d) 1 Redf. Wills, 54-55. 1 Wilkams Exors. 17. 4 Burn's E. L. 60-61. *Barton v. Robins*, 3 Phillim. 445 n. (h).

(e) 4 Burns E. L. 60. *Moore v. Paine*, 2 Cas. temp. Lee. 595; In the goods of *Azford*, 1 S. & T. 540.

(f) *Fincham v. Edwards*, 3 Curt. 63; S. C. 4 Moo. P. C. 198. *Longchamp d. Goodfellow v. Fish* 2 N. R. 415.

CHAPTER VI.

OF THE DISABILITY CREATED BY CRIMINAL CONDUCT.

1. Traitors and felons considered intestable by Blackstone.—
Reason of this rule.
2. Probate granted in a recent case of will of a *felo-de-se*.
3. *Felo-de-se* may bequeath goods which he has as executor.
4. Forfeiture of estate consequent on treason or felony, regulated by Statute.

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1. It is laid down by Blackstone that traitors and felons are intestable from the time of conviction, for the reason simply that they have nothing to dispose of, their goods and chattels being forfeited to the Crown (a). And a similar forfeiture follows the commission of suicide (b)

2. In a recent case Sir C. Cresswell granted probate of the will of a *felo-de-se*, supporting the contention of counsel that the executor had a right to traverse the verdict of the coroner's jury, and that if the *felo-de-se* was executrix, her act did not forfeit that office (c).

3. A *felo-de-se* may bequeath goods and chattels which he has as executor (d). The lands of a *felo-de-se* are not subject to forfeiture (e).

4. The forfeiture of estate, consequent upon the commission of treason or felony, is now regulated by various statutes.

(a) 2 Black. Comm., 499. P., 178. 1 Williams Exors., 62.
(b) 2 Black. Comm., 499. (d) Godolph. Pt. 1, c. 12, s. 2; 4
(c) In the Goods of *Bailey*, 2 S. & Burn's, E. L., 61.
T. 156; 7 Jur. N. S., 712; 31 L. J. (e) 3 Inst. 55. 4 Burn's, E. L., 62.

CHAPTER VII.

UNSOUNDNESS OF MIND.

SECTION I.

Idiocy.

1. Idiots absolutely disabled from disposing of their property by will.
2. Idiocy defined.
3. Opinion of Dr. Ray.
4. Idiocy a question of evidence in each particular case. Example furnished by the case of *Bannatyne v. Bannatyne*.

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1. Idiots are absolutely disabled from disposing of their property by will (a). An idiot is described to be a person who has not any use of reason ; has no understanding to tell his age ; who is his father or mother ; what shall be for his profit or loss. "A man is not an idiot," says Blackstone, "if he hath any glimmering of reason (b).

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2. It is said by another writer that idiots have something of memory and imitation whereby they are able, to a very limited extent, to increase their knowledge of facts. But they are wholly deficient both in the perceptive and reflective faculties. They possess neither observation nor judgment, and the little memory they have is wholly passive. They have no ability to recall at will past transactions, and no forecast (c).

3. Late writers on medical jurisprudence regard idiocy as incapable of strict definition. Dr. Ray, an eminent authority, states idiocy to be that condition of the mind in which the reflective, and all or part of the affective,

(a) 1 Jarm. Wills 29. 1 Williams  
Exors. 16. 1 Redf. Wills, 60-61.

(b) 1 Black. Comm. 304.  
(c) 1 Redf. Wills, 64-65.

BOOK II. powers are either entirely wanting or are manifested to  
 CHAP. VII. the least possible extent. In reasoning power, many  
 SECT. I. idiots are below brutes. Unable to compare two ideas  
 together, nothing leads them to act but the faint impres-  
 sions of the moment; and these are often insufficient to  
 lead them to gratify even their instinctive wants (a).

4. The question of idiot or not is one of evidence and must be decided upon the circumstances of each particular case. In a late case (b), Dr. Lushington makes the following instructive remarks upon the subject of idiocy: "Before entering upon this branch of the case, I must bear in mind what the nature of the case set up in opposition to the will is, I must repeat that it is not lunacy—it is not monomania—it is not any species of mental disorder, the symptoms of which it may, at periods, be difficult to detect; but the case presented is that of idiocy or imbecility, the characteristic of which is permanence, with little or no variation, though often, in the case of idiots, it does sometimes happen that there will be a greater degree of excitement demonstrated than at other periods. How is such a case to be met? I apprehend, to meet it, and to show that such a state of things did not exist at any given period, proofs of acts of business are most important evidence. Many acts of business could possibly be done by a lunatic, and the lunacy not detected; but it is scarcely possible to predicate the same of an idiot or an imbecile person. I shall look, therefore, in the first instance, to the acts of business. It is proved by Mr. F. that the deceased kept an account with Messrs. T., at Bath, for four years from 1818 to 1821, and during all that period occasionally drew drafts, and all those drafts

(a) Ray Med. Jur. Insanity ss. 54 et seq. Taylor Med. Jur. 633, ed. 1861, 634. Wharton Stille, Med. Jur. s. 222.

(b) *Bannatyne v. Bannatyne*, 2 Rob. 472.

were paid to himself over the counter. ... According to the evidence, the deceased came himself to the counter, and there is no proof of anyone accompanying him on such occasions; he asked for the sum he wanted; the clerk filled it in, he signed it, and took the money. Surely no idiot could have done this, for he must have exercised thought to go to the bank, memory and judgment as to the sum required; and, moreover, his conduct and demeanour could not at such times have been as described by the witnesses against the will, or, from the glaring colours in which his imbecility is depicted, it must have been discovered, and the business never could have been transacted at all. I consider these transactions, then, of first rate importance towards solving all the difficulties of this case. I will simply repeat what I have already indeed said, that those who are afflicted with lunacy sometimes have the management of, and can manage, their pecuniary affairs—an idiot never."

BOOK II.  
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Sect. I.

## SECTION II.

### *Insanity.*

1. Meaning of term "lunatic."
2. Meaning of term "insanity."
3. Main test of insanity said to be "delusion."
4. Definition of "delusion."
5. Opinion of the Court in *Stanton v. Wetherax*.
6. Case of *Smith v. Tebbitt* considered in connection with delusion.
  - (a) Dr. Willis' definition of delusion.
  - (b) No fault to be found with the language of definitions referred to.
  - (c) Question of "insanity" and question of "delusion" one and the same.
  - (d) In simple cases, proof of the delusion proof of insanity.
  - (e) More complicated cases. What is to be said of them?
  - (f) What are to be the tests of insanity?
  - (g) No tests furnished by the decided cases.
  - (h) The test of comparison with one's own mind.
  - (i) Insanity may be suspected without being proved. In other cases, patients' ideas, conduct, and demeanour, contrast with those of their fellow-men.

- 7 Of the test of sanity. Opinion of Dr. Ray.
- (a) Comparison with himself as a test of a man's sanity.
  - (b) Comparison with persons resembling the alleged patient in temperament and character.
  - (c) Individual character endless in its varieties.
  - (d) Conclusions to be drawn from same acts committed by different persons.
  - (e) Comparison with the insane. Opinion of Dr. Prichard.
  - (f) Examples given by Esquirol.
  - (g) Another example by the same writer.
8. Mode of testing a person's sanity considered.
9. Difficulty of laying down any general rule.
10. Insane person cannot make a will of lands or goods.
11. Proof of insanity lies on the person who alleges it. Sanity is presumed till the contrary is shown.
12. The burden of proof shifted if party who supports the will gives evidence of competency. Judgment in *Sutton v. Sadler* on question of presumptions.
- (a) Reference to the cases cited on presumptions.
  - (b) Opinion of Lord Chancellor in *Attorney-General v. Parnther*.
  - (c) Opinion of Professor Greenleaf.
  - (d) Opinion of Mr. Starkie in his work on Evidence.
  - (e) Case of *Barry v. Butlin* referred to.
  - (f) Opinion of Lord Brougham in *Waring v. Waring*.
  - (g) Conclusion to be drawn from the authorities.
13. Burden of proof in the case of a will found mutilated after death of testator, who became insane.
14. Will may be good as to one part and bad as to another.
15. Instructions for a will may be supported as a will, if insanity supervenes before regular will prepared.

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1. The term "lunatic" in its more extended import includes all persons of unsound mind who are not idiots or imbeciles (a). Lunatics were formerly supposed to be under the peculiar influence of the moon, from which the term is derived. This idea resulted from the occurrence of lucid intervals, which are common in the first stages of all cases of insanity, and occur sometimes at intervals of irregular duration and frequency, sometimes periodically, and with some appearance of regularity (b).

2. The term "insanity" though, strictly speaking, it comprehends all degrees of unsoundness of mind, is most

(a) 1 Redf. Wills, 62-63.

(b) 1 Redf. Wills, 61-62.



commonly used in the same sense as lunacy, as defined above, and in that sense it is proposed to use it in the present chapter.

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SECT. II.

3. The main test of insanity, in a legal point of view, is said to be the existence of delusion (*a*). In *Dew v. Clark* (*b*) Sir John Nicholl said, "The true criterion, the true test of the absence or presence of insanity, I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely 'delusion.' Whenever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination; and whenever, at the same time, having once so conceived it, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delusion, in a peculiar half-technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity. In short I look upon delusion in this sense of it, and insanity to be almost if not altogether convertible terms, so that a patient under a delusion, so understood, on any subject or subjects in any degree, is, for that reason, essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable, and how like soever to a real madman he may either speak or act on some or on all subjects, still, in the absence, I repeat, of anything in the nature of delusion so understood as above, the supposed lunatic is, in my judgment, not properly or essentially insane."

4. Assuming the test of insanity stated by Sir John

(*a*) Taylor Med. Jur. ed. 1861, 629.

(*b*) 1 Add. 279 S. C. 3 Add. 72; S. C. 5 Russ., 163.

BOOK II. Nicholl to be the true one, we are at once called to the  
CHAP. VII. consideration of the word "delusion." What does it mean?

SECT. II. The same learned judge in *Wheeler v. Alderson* (a) supplies a definition of delusion. "Delusion," he says, "is defined to be, when a patient conceives something extravagant to exist which has no existence but in his own heated imagination, and, having so conceived it, is incapable of being reasoned out of the conception (b); as, the fancying things to exist which can have no existence and are impossible according to the nature of things, as that trees walk (c); the magnifying slight circumstances beyond all reasonable bounds, as, if the parent of a child, really blamable to a certain extent in some particulars, takes occasion to fancy her a fiend, a monster, an incarnate devil (d). We can comprehend the delusion of a man who fancied he was Jesus Christ, and kindly extended his forgiveness when asked, saying, 'I am the Christ;' also his, who imagined he corresponded with a princess in cherry juice, and his, who dreamed dreams and heard voices directing him to burn York Minster Church. But we cannot comprehend a delusion upon a point of belief as to the nature of future rewards and punishments, and the principles of justice upon which they will be distributed. This is a subject beyond the ken of mortal man, and, in one sense of the word, perhaps, every individual is labouring under a delusion who attempts to solve it. Yet there is no subject we are more disposed to theorize about, and about which there is a greater conflict of opinion. The fool hath said in his heart there is no God, and, of course, no future rewards and punishments; a dreadful error, yet no one apprehends that it amounts to insanity, and that he has not a disposing mind. The Turk looks to his hea-

(a) 3 Hagg, 598-599.

(b) Shelford Lunacy, 40.

(c) Shelford, 293.

(d) Shelford, 41.

ven of sensual enjoyment, the Christian to his intellectual points of faith, differing as widely as the sources of their religion. Delusion, in its legal sense, cannot be predicated of either; and, indeed, of no creed upon the subject, because there is no test, by which it can be tried. The testator's impressions are innocent and harmless at least, and, for aught we can say, may be true. Charity, in all its ramifications, is a theme upon which our Saviour, while on earth, dwelt again and again with marked emphasis, and enforced with the strongest promises of rewards and punishments. Upon this point there is no error."

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5. And, in an American case (*a*) it is laid down that, wherever the person conceives something extravagant to exist, which has in fact no existence whatever, and he is incapable of being reasoned out of this false belief, it constitutes insanity, and, if this delusion regard his property, he is incapable of making his will. "It is only the belief of facts which no sane person would believe, which is insane delusion" (*b*).

6. In the recent case of *Smith v. Tebbitt* (*c*), Sir J. P. Wilde seemed unwilling to accept the definition of insane delusion laid down by Sir John Nicholl and the other authorities to which we have referred. Speaking of the test of delusion, he says (*d*): "Thus far all is clear, but beyond it I search the decided cases in vain for a guide. What is to be the proof of disease? What is to be the test, if there be a test, of morbid mental action? The existence of mental 'delusions,' it would perhaps be an-

(*a*) *Stanton v. Wetherax*, 16 Barb., 229.

(*b*) Taylor's Med. Jur., 626, 6th edition. In a review of the first edition of the Medical Jurisprudence of Insanity, Dr. Ray, in questioning the former definitions of insane delusions, says: "If we may be allowed to try our hand at a definition

of delusion, we should call it a belief in something impossible in the nature of things by the circumstances of the case.—*Journal of Insanity*, April, 1865, 515.

(*c*) L. R. 1 Prob. 396; 36 L. J. 97; 16 L. T. N. S. 841.

(*d*) At p. 401.

Book II. answered. But this only postpones the question in place of  
 CHAP. VII. answering it. For what is a mental 'delusion'? How is  
 Sect. II. it to be defined so as to constitute a test, universally applicable, of mental disorder or disease? The word is not a very fortunate one. In common parlance, a man may be said to be under a 'delusion' when he only labour under a mistake. The 'delusion' intended is, of course something very different. To say that a 'morbid' or an 'insane delusion' is meant, is to beg the question, for the 'delusion' to be sought is to be the test of insanity; and to say that an insane or morbid delusion is the test of insanity or disease, does not advance the inquiry." "A belief of facts which no rational person would have believed," says Sir John Nicholl (a). "No *rational* person. This, too, appears open to a like objection, for what are the limits of a rational man's belief? And to say that a belief exceeds them, is only to say that it is irrational or insane. "The belief of things as realities which exist only in the imagination of the patient," says Lord Brougham, in *Waring v. Waring* (b). But surely sane people often imagine things to exist which have no existence in reality, both in the physical and moral world. What else gives rise to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams?

(a) "I turn to another definition. It is by Dr. Willis, a man of great eminence, and is quoted by Sir John Nichol in *Dew v. Clark*. 'A pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity. This seems to offer a surer ground; but then the 'evidence' of the falsity is to be 'plain,' and who shall say if it be so or not? In many or most cases it would be easy enough. Those who have entertained the 'delusive

(a) In *Dew v. Clark*, reported by Dr. Haggard at p. 7.

(b) 6 Moo. P. C. at p. 354.

**idea** ' that their bodies were made of glass, or their legs **of** butter (as it may be found in medical works that some **have** done), certainly have 'plain evidence' at hand—the evidence of their senses—of its falsity. But what if **the** 'delusive idea' concern a subject in which the senses **play** no part, and the 'plain evidence' by which it is to **be** discharged is matter of reasoning, and addressed to the intellectual faculty? Will all sane men agree whether the evidence is plain or not? And, if not, shall one man in all cases pronounce another a monomaniac when the evidence is plain, to his reason, of the falsity of the other's **ideas**?

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(b) "I find no fault with the language of these definitions as fairly and properly describing the mental phenomena they are used to depict. I only assert that the existence of mental delusions thus defined is not capable of being erected into a universal test of mental disease.

(c) "It is, no doubt, true that mental disease is always accompanied by the exhibition of thoughts and ideas that are false and unfounded, and may therefore be properly called 'delusive.' But what I mean to convey on this head is this, that the question of insanity and the question of 'delusions' is really one and the same—that the only delusions which prove insanity are insane delusions—and that the broad inquiry into mental health or disease cannot in all cases be either narrowed or determined by any previous or substituted inquiry into the existence of what are called 'delusions.'

(d) "I say in all cases; for in some such as those to which I have already alluded, where the delusive idea ought to receive its condemnation and expulsion at once from the simple action of the senses, the contrary is the case; and the same may be said of delusions obviously opposed to the simple ordinary and universal action of reason in

BOOK II. healthy minds. These are the simple cases, about which  
 CHAP. VII. no one would doubt, and in them the proof of the 'delu-  
 Sect. II. sions' is also the proof of insanity without more.

(e) "But what is to be said of the more complicated cases? What if the diseased action of the mind does not exhibit itself on the surface, as it were, opposing its hallucinations to the common senses or reason of all mankind, but can be tracked only in the recesses of abstract thought or religious speculation—regions in which the mental action of the sane produces no common result—and all is question and conflict? In what form of words could a 'delusion' be defined, which would be a positive test of insanity, in such cases as these? In none, I conceive, but '*insane delusions*,' or words of the like import, which carry with them the whole breadth of the general inquiry.

(f) "How, then, is this question of insanity to be approached by a legal tribunal? What tests are to be applied for disease? What limits assigned within which extravagance of thought is to be pronounced compatible with mental health?

(g) "The decided cases offer no light on these heads. I nowhere find any attempt to devise such tests or assign such limits. Nor do I conceive that any tests, however elaborate, beyond the common and ordinary method of judging in such matters, would be competent to bear the strain of individual cases in the course of experience. It is perhaps worth while, then, to step aside for a moment to inquire what that common and ordinary method of judging is, and upon what it is founded.

(h) "No man knows aught of the condition of another's mind except by comparison with his own; and, in instituting this comparison, we recognise the general fact that all mankind are endowed with the same senses, moved by

the like emotions, governed by the same restraints, and guided by the same faculties. All these vary in their force and action in different individuals, or the same individual at different times. But they vary within certain limits, and certain limits only. It is when the words or deeds of others, referred to our own standard and that which, by experience, is found to be the common standard of the human race, appear to transgress those limits, that we suspect these common senses, emotions, and faculties, which we know to exist, to be the subjects of disorder or disease. If the divergence be very marked, and exhibit itself either on many subjects or with uniform constancy in the behaviour of the individual, we pronounce disease without hesitation. In proportion as the divergence is either casual or trifling, or open to some other probable solution, the inquiry is difficult, and the judgment hesitates. Here, then, I think, is the simple rule by which mankind in general pronounce upon mental disease. But to those who have studied the subject of insanity another and alternative method is open.

(i) "There may be, and no doubt are, many whose insanity is suspected but not proved; but in the large majority of the insane, mental disease admits of no doubt whatever. Their ideas, their conduct and demeanour, contrast at almost every point of comparison with those of their fellow-men. And it is the especial business of those who devote themselves to the mitigation or cure of this fearful malady, to study the ways and forms of thought and expression which attend upon it; the sort of things that the insane say and do; their bearing and demeanour; the occasions they choose or decline for the exhibition of their ruling ideas. All these become familiar to the medical attendant. Hence he is furnished with another road by which to approach the determination of insanity in a doubtful case.

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BOOK II. He can reason from the certainly to the probably diseased  
 CHAP. VII. mind, and is enabled to trace in the latter, lineaments  
 Sect. II. which are clearly marked in the former. Thus, while the  
 world at large can only contrast the doubtful case with  
 the sane, the physician has at hand the alternative con-  
 trast with the insane. It is a consequence of these alter-  
 nate methods of judgment that the question of insanity,  
 though it falls to the lot of a legal tribunal, is properly a  
 mixed one—partly within the range of common observa-  
 tion, and in so far fit to be considered by a jury ; partly  
 within the range of special experience, and in so far the  
 proper subject of medical enquiry. It is the office of the  
 Court, then, to inform itself, as far as opportunity permits,  
 of the general results of medical observation, and to ap-  
 proach the subject of this case on the two opposite sides  
 thus indicated—searching for a fit conclusion by alter-  
 nately presenting the parallel of sanity and insanity to  
 the sayings and doings of the deceased.”

7. The same learned judge, in the same case (a), made  
 the following remarks upon the subject of comparison with  
 others as a test of the sanity of an individual. He says :  
 “Some thoughtful remarks on this head will be found in  
 Dr. Ray’s work on the ‘Medical Jurisprudence of Insan-  
 ity.’ He says : “To lay down any particular definition  
 of mania founded on symptoms, and to consider every  
 person mad who may happen to come within the range of  
 its application, would induce the ridiculous consequence  
 of making a large portion of mankind of unsound mind.  
 Some men’s ordinary habits so closely resemble the beha-  
 viour of the mad, that a stranger would be easily deceived ;  
 as in the opposite case, where the confirmed monomaniac,  
 by carefully abstaining from the mention of his halluci-

(a) At p. 421.



ations, has the semblance of a perfectly rational man. Hence, when the sanity of an individual is in question, instead of comparing him with a fancied standard of mental soundness, as is too commonly the custom, his natural character should be diligently investigated, in order to determine whether the apparent indication of madness is not merely the result of the ordinary and healthy constitution of the faculties. In a word, he is to be compared with himself, not with others, and if there have been no departure from his ordinary manifestations, he is to be judged sane; although it cannot be denied that striking peculiarities of character, such as amount to *eccentricity*, furnish strong ground of suspicion of predisposition to madness."

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(a) "Compare a man with himself," says Dr. Ray; 'his acts and thoughts now with his acts and thoughts at some previous period, when his mind was in undoubted health. You will the better detect what is morbid, than if you set up a general comparison with the thoughts and acts of mankind.' It is a variation of this reflection to say, compare a man's acts and thoughts with those of mankind whom in general temperament and character he most resembles.

(b) "It may be that there is no period of undoubted health in the previous life of the patient to which you can refer, or the details of it may be wanting: and, in the absence of these, the best standard of comparison will present itself in persons whose general temperament and character have some resemblance,—the closer the better,—to those of the individual whose sanity is in question. It is upon no other method of reasoning that mankind habitually form their judgment in such matters.

(c) "Individual character, like the human face, though made up of features common to all, is endless in its va-

BOOK II. rieties. But experience teaches us that there are gene  
 CHAP. VII. attributes which serve to divide the bulk of mankind in  
 Sect. II. many classes of character, and these classes present mark  
 contrasts. The hilarious contrast with the dejected ; the  
 nervous and sensitive with the coarse and bluff ; the  
 vacuous with the habitually silent and reserved ; the bold  
 and confident with the timid and weak ; the open and  
 lavish with the crafty and mean ; and lastly, the high  
 wrought and enthusiastic with the tame, colourless and  
 commonplace. And these general characteristics are never  
 practically omitted from the materials of judgment with  
 which in common life we pass an opinion upon the conduct  
 of others. We habitually make allowance for them, whether  
 we scrutinize their conduct for praise or blame, or whether  
 we rely upon it for our own guidance, and not the less  
 when we have to ask ourselves whether the conduct of  
 an individual can be reconciled with soundness of mind.  
 Things said and done by one sort of person would hardly  
 surprise us ; the same words and deeds emanating from  
 another of an opposite character we should esteem so  
 unaccountable as to argue disease.

(d) " In the former we perceive excesses beyond the  
 ordinary standard to be in harmony with their general  
 character, and we recognize them as features of it. In the  
 latter we perceive extravagances as much at variance  
 with their own ordinary character and deportment  
 with that of the rest of the world, and we pronounce them  
 to be the offspring of morbid influence. It is, therefore,  
 to mislead the judgment, not to guide it, to avert the true  
 conclusion, not to induce it, that a parallel should be  
 set up between such a person as Mrs. Thwaytes and those  
 whose religious fervour has rendered them famous. And  
 yet, if this argument fails, what warrant is there for affirm-  
 ing that Mrs. Thwaytes' ideas were (within the range

experience) such as sane people have been known to entertain?

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(e) "I turn now to the comparison with the insane. Dr. Prichard, in his well-known work on 'Insanity in Relation to Legal Questions,' speaks of the following peculiarities attending monomania: 'The illusions or false impressions of the monomaniac have always, as I have said, reference to himself; they relate sometimes to his fortune, rank, or personal identity; at others, to his health of body and his sensations. In the former class of cases, the patient, feeling himself unhappy, fancies himself in debt, ruined, betrayed; or, being disposed to an opposite state of feelings, possessed of great wealth and affluence, and superior to all mankind. The difference of these impressions seems to depend upon the different state of spirits; the persons affected by the former kind of impressions are those whose minds are predisposed to gloom and forebodings of ill; the latter kind affect the sanguine and excitable. Many fancy themselves kings or emperors, prophets, or the pope. I have seen a French lunatic who exclaimed, with great appearance of dignity: "Je suis le pape, le saint-père de l'Eglise."' "

(f) "'Among monomaniacs,' says Esquirol, 'some believe themselves to be divine beings, and pretend to hold communication with heaven, declare that they have a commission from above, and set up for prophets or for divines; they fancy themselves supernaturally enlightened, and possessed of supernatural power.' "

(g) "And again: 'We have at the Salpêtrière,' continues the same writer, 'a young woman who had received some instruction in science, and who fancies that she directs the sun, the moon, and clouds; when she is impatient of her abode in the hospital, she sometimes threatens us with rain, sometimes with drought. I have seen in the

BOOK II. same hospital many females who fancied themselves em-  
 CHAP. VII. presses. Many think themselves kings and potentates,  
 Sect. II. and issue commands to their subjects; some believe them-  
 selves to be men of fame and distinguished philosophers;  
 others are celebrated poets or orators, and it is necessary  
 to listen to their compositions in order to avoid giving  
 them severe offence; others, loaded with riches, distribute  
 their benefits, and disperse their fortune on all who come  
 to them in want.' "

8. It has been laid down that, where a person is labouring under an insane delusion, the proper mode of testing his sanity is to direct his attention to the subject matter of such delusion; but, where a person is afflicted with habitual insanity, unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals (a).

9. The opinions which have been given by various judges, as to the mode of testing insanity, shew that it is impossible to lay down any general rule which will meet every case. The consideration of insanity generally is closely involved in that of partial insanity or monomania, which forms the subject of the next section.

10. A person, while insane, cannot make a testament of either lands or goods (b). And a testament made during the continuance of the insanity cannot stand, even though the madness pass away (c).

11. If a person impeach the validity of a will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity (d).

(a) *Nichols v. Binns*, 1 S. & T. 239.

(b) *Swinb. Pt. 2, s. 3. Godolph. Pt. 1, c. 8, s. 2. 1 Williams Exors.*  
 18.

(c) *Swinb. Pt. 2, s. 3, pl. 2. Godolph. Pt. 1, c. 8, s. 2. 1 Williams Exors.*  
 18.

the clearest and most satisfactory proofs (a). The burden of proof rests upon the person attempting to invalidate what, on its face, purports to be a legal act (b). Sanity must be presumed until the contrary is shown (c). Hence, if there is no evidence of insanity at the time of giving the instructions for a will, the commission of suicide three days after will not invalidate the instrument by raising an inference of previous derangement (d).

12. Should, however, the party who supports the will, instead of resting upon the presumption raised by law in favour of the sanity of the testator, give evidence of the competency of the testator, the *onus* of proof then remains on him to shew competency; and, where there is evidence given impeaching such competency, the jury must decide upon the whole of the evidence given on both sides, and, if it does not satisfy them that the will is valid, they ought to pronounce against it (e). Some very valuable observations on the doctrine of presumptions are contained in the judgment of the Court in the case last referred to. Cresswell, J., delivering the judgment of the Court of Common Pleas, said, "This was an ejectment tried before Bramwell, B., at the last Chester assizes. The defendant admitted that the plaintiff was heir-at-law of the person last seised, and claimed as devisee, and insisted upon the right to begin, which was granted. His counsel then produced a will, and, after proving the execution of it, as required by the stat. 7 W. IV., and 1 Vict., c. 26, called witnesses to prove the competency of the testator. The plaintiff then gave evidence

(a) The law seems unsettled as to how far in cases of alleged unsoundness of mind hereditary constitutional insanity may be pleaded. *Frere v. Peacock*, 3 Curt. 664.

(b) 2 Phill. Ev. 293, 7th Ed.

(c) *Groom v. Thomas*, 2 Hagg. 434.

(d) *Burrows v. Burrows*, 1 Hagg. 109. See also *Hoby v. Hoby*, 1 Hagg. 146. 1 Williams Exors. 18, 19.

(e) *Sutton v. Sadler*, 3 C.B.N.S. 87; 3 Jur. N.S. 1150; 26 L.J.C.P. 284.

BOOK II. to impeach his competency, and endeavoured to show that  
 CHAP. VII. he had been incompetent *a nativitate*. The learned judge,  
 Sect. II. in summing up, told the jury that the heir-at-law was entitled to recover unless a will was proved; but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail unless the heir-at-law established the incompetency of the testator; and that if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant. A verdict having been found for the defendant, a rule nisi for a new trial was granted in Easter Term, it being alleged that the learned judge misdirected the jury.

(a) "The question was argued before us after last term, and some cases were cited in which it has been said that sanity is presumed, and that the *onus* of proof is on him who disputes it. The cases principally relied on were, *The Attorney-General v. Parnter* (a), *Groom v. Thomas* (b), and *Brooks v. Barrett* (c); and a passage in Greenleaf's Treatise on Evidence was also relied on.

(b) "The case of *The Attorney-General v. Parnter* was cited for the following passage in the judgment of the Lord Chancellor: 'If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must shew competency at the period when the act was done, and to which the lucid interval refers.' If that is correct,—and we see no

(a) 3 Bro. C. C., 441.  
 (b) 2 Hagg. 434.

(c) 7 Pick. U. S. Rep. 94.

reason to dispute it,—the converse also is true, and he who alleges incompetency must prove it. Now, he who relies on a will in opposition to the title of the heir-at-law, must allege that it is the will of a person of sound and disposing mind; he must therefore prove it. The case of *Groom v. Thomas* (a) was, in circumstances, very similar. The testator was admitted to have been once sane, and afterwards insane; and there the Court held, that the party propounding a will, executed after the period when the testator was admitted to have become insane, was bound to prove sanity. The decision, therefore, was no authority for the defendant in this case. It was cited for the principle laid down by Sir John Nicholl,—“Every person is presumed to be sane until it is shewn that he has become insane; the presumption then changes; it is presumed that he *continues* of unsound mind, and the party setting up any instrument (executed) after insanity has manifested itself, has the burthen of proof cast upon him; he must shew recovery.’ That is perfectly correct; but the learned judge of the Ecclesiastical Court was evidently dealing with a case of admitted original sanity, rather than of proved insanity; and it has no application to a case where capacity was never admitted; nor was he affecting to state the precise nature and extent of the presumption to be made in favour of sanity.

(c) “Reliance was also placed on two passages in the very learned work on Evidence by the late Professor Greenleaf. In s. 42 of the first volume (b) he says: ‘Every man is presumed to be of sane mind until the contrary is shewn;’ and for this he refers to *The Attorney-General v. Parnter*, and Hale’s Pleas of the Crown (c). It therefore carries the case no further. The rule in criminal cases depends

BOOK II.  
CHAP. VII.  
SECT. II.

(a) 2 Hag. 434.  
(b) 7th Ed.

(c) P. 30.

BOOK II. upon different considerations. Again, under the title  
 CHAP. VII. 'Wills,' in s. 689, the learned professor writes: 'In re-  
 SECT. II. gard to insanity, or want of sufficient soundness of mind,  
 we have heretofore seen, that, though in the probate of a  
 will, as the real issue is, whether there is a valid will or  
 not, the executor is considered as holding the affirmative,  
 and therefore may seem bound affirmatively to prove the  
 sanity of the testator, yet we have also seen that the law  
 itself presumes every man to be of sane mind until the  
 contrary is shewn;' and he refers to the passage before  
 mentioned, to a passage under the title 'Insanity' (a)  
 (which relates to the responsibility of a party for his ac-  
 tions), and to *Brooks v. Barrett* (b). He adds, 'The bur-  
 then of proving unsoundness or imbecility of mind in a  
 testator is therefore on the party impeaching the validity  
 of the will for this cause.' If the learned professor, by  
 this passage, means that the competency of a testator is  
 to be presumed until it is impeached by evidence, we agree  
 with him; but if he means that a will must be assumed  
 to be valid, as made by a competent testator, unless the  
 court or jury who have to decide upon it are convinced  
 that he was incompetent, we think it is not in accordance  
 with the English authorities on the subject. The profes-  
 sor says that the competency of a testator is a presumption  
 of law, not of fact.

(d) "On this doctrine of presumptions there is a very  
 learned chapter in 'Starkie on Evidence.' He divides pre-  
 sumptions into presumptions of law, which are altogether  
 artificial; presumptions of law and fact, which are of a  
 mixed character (being also artificial presumptions, but  
 to be found by juries, being recognized and warranted by  
 the law as the proper inferences to be made by juries

(a) S. 373.

(b) 7 Pick. U. S. Rep. 94.



under particular circumstances); and natural presumptions, or presumptions of mere fact. The presumption of sanity cannot, we think, be treated as a merely artificial or legal presumption, but, at the utmost, as a presumption of law and fact—that is, an inference to be made by a jury from the absence of evidence to shew that a party does not enjoy that soundness which experience proves to be the general condition of the human mind. But in such cases, when evidence is laid before a jury, they must decide according to what they believe to be the truth; and, when a will is set up as a valid will, a jury ought not to pronounce it to be so, unless they are convinced of the affirmative. In another passage, Mr. Starkie speaks of the presumption of sanity in a testator as a presumption of fact.

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SECT. II.

(e) "On the other hand, the counsel in support of the rule called our attention to *Barry v. Butlin* (a), where *Parke, B.*, stated as the indisputable rule of law that the *onus probandi* lies in every case on the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator; and to *Harwood v Baker* (b). In this latter case, a will had been propounded in the Prerogative Court of Canterbury. The attesting witnesses were examined, and several others on either side. The judge of that Court by his decree pronounced against the force and validity of the pretended will, upon the ground that the evidence adduced was not sufficient to prove that the deceased was a capable testator. Against this decree, the party propounding the will appealed. The Judicial Committee dismissed the appeal, 'because the party propounding the will had not satisfactorily

(a) 2 Moo. P. C. 481.

(b) 3 Moo. P. C. 282.

BOOK II. proved, as he was bound to do, that the paper in question  
 CHAP. VII. did contain the last will and testament of the deceased.'  
 SECT. II. In neither of these cases was any weight given to the  
 presumption of sanity unconnected with the evidence.

(f) "Some very valuable observations on this subject are to be found in the judgment of Lord *Brougham* in *Waring v. Waring* (a): 'The burthen of proof,' says his lordship, 'often shifts about in the progress of the cause, accordingly as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on the one or the other party the necessity of protecting himself from the consequences of such inferences. Nor can anything be less profitable as a guide to our ultimate judgment, than the assertion, which all parties are so ready to put forward severally, that, in the question under consideration, the proof is on the other side. Thus, no doubt, he who propounds a latter will, undertakes to satisfy the Court of Probate that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the *factum* is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor (the party propounding) choose to rest satisfied with his *prima facie* case after an issue tendered against him. In this case, the proof has shifted to the impugner; but his case may easily shift it back again. The result must be the same where the party propounding does not rely upon a *prima facie* case, but gives the whole of his proof in the first instance. The *onus* remains on him throughout; and the court or jury who have to decide the question in dispute must decide upon the whole of the evidence so given; and, if it does not satisfy them that the will valid, they ought to pronounce against it.

(a) 6 Moo. P. C. 355.

(g) "If, indeed, a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will; and if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the will; and in either case, the presumption in favour of competency would prevail. But that is not a mere presumption of law; and, when the whole matter is before the jury on evidence given by both sides, they ought not to affirm that a document is the will of a competent testator, unless they believe that it really is so. The result is that the rule for a new trial must be made absolute (a)."

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13. Where a will was executed by a testatrix whilst of sound mind, and she subsequently became insane, and the will was proved to have been in her custody after she became of unsound mind, and the will after her death was found mutilated; it was held by Sir C. Cresswell that the *onus* of proving that the testatrix was of sound mind when the will was mutilated lay upon the party who alleged that the mutilation was a revocation of the will (b).

14. A will may be sustained as to one part and rejected as to another, if, at the time of the execution of the latter part, the testator was of unsound mind (c).

15. It will be seen hereafter, that instructions for a will, committed to writing, may be a good will of personalty, in the event of the testator's death before a formal will is

(a) See also *Symes v. Green*, 1 S. & T. 401.

(b) *Harris v. Berrall*, 1 S. & T. 153.

(c) *Billinghurst v. Vickers*, 1 Phil-

lim. 187. *Wood v. Wood*, *ibid*, 357, and see *Trimlestown v. D'Alton*, 1 Dow. N. S. 85. *Haddock v. Trotman*, 1 F. & F. 31.

- BOOK II. prepared (a). Upon the same principle, should insanity  
 CHAP. VII. supervene before the will is prepared or read over, the  
 Sect. II. instructions may be admitted to probate (b).

### SECTION III.

#### *Of Partial Insanity or Monomania.*

1. Monomania exhibits itself only to a limited extent.
2. Will of monomaniac may be connected with the subject of the monomania or may not.
3. The case of *Greenwood* as stated by Lord Eldon.
4. Case of *Dew v. Clark*, a leading authority on this subject—opinion of Sir John Nicholl.
  - (a) Violence, cruelty, or antipathy is not insanity. There must be mental perversion on the subject of the will.
  - (b) Partial insanity is known to the law—Lord Hale's definition of partial insanity—difficulty of properly defining it.
  - (c) The forms and developments of madness almost infinite.
  - (d) The term "Madness" loosely applied in popular use.
  - (e) Difference between insane and other delusion.
  - (f) Dr. Battie defines it as "deluded imagination."
  - (g) Locke supposes it consists in reasoning from false premises.
  - (h) But he includes false fancies and partial derangement in his definition.
  - (i) Opinion of Dr. Willis referred to.
  - (k) A sound mind one wholly free from delusion.
5. Cases establish that a will prompted by insane delusion is void.
6. Lord Brougham, in *Waring v. Waring*, expressed his opinion that any person labouring under delusion was incompetent to make a will.
7. This opinion approved of by Sir J. P. Wilde, in *Smith v. Tebbitt*.
8. This doctrine overthrown by recent case of *Banks v. Goodfellow*—
  - (a) Lord Cockburn treats the question of the effect of partial unsoundness on the testamentary capacity, when such unsoundness is unconnected with the will, as raised for the first time.
  - (b) The text writers throw no light on the point.
  - (c) *Combe's case*, *Greenwood's case*, and other cases considered.
  - (d) Remarks on the opinion of Sir William Wynne, in *Cartwright v. Cartwright*.
  - (e) Case of *Waring v. Waring* stated.
  - (f) Doctrine, under consideration, not necessarily involved either in that case or in *Smith v. Tebbitt*.
  - (g) A connection between the will and the delusion allowed to be fatal.

(a) See post. Book iii. c. iii. s. iii.

(b) 1 Williams Exors. 41. *Moore v. Hackett*, 2 Cas. temp. Lee 147. *Garnet v. Sellars*, cited by Sir G. Lee, 1 Cas. temp. Lee 186. *Fulbeck v. Atkinson*, 3 Hagg. 527.

- (h) Opinions of foreign Jurists on the subject.
  - (i) These writers have not gone deeply into the subject.
  - (k) The law of civilized nations concedes right of leaving property by will.
  - (l) Foreign law differs in some respects from our own as to extent of this right, possession of the faculties, however, being an indispensable requisite.
  - (m) Effects of mental disease, &c., on this power of disposition by will.
  - (n) Power of testamentary disposition is founded on the principle that a rational will is a better disposition, than can be made by the law itself.
  - (o) Unsoundness arising from defective organization or supervening physical infirmity considered.
  - (p) References to the American cases.
  - (q) Case of *Den v. Vancleve* considered.
  - (r) Case of *Stevens v. Vancleve* considered.
  - (s) Last case fully approved by the Court in *Sloan v. Maxwell*.
  - (t) Remarks on *Harwood v. Baker*.
  - (u) Suggestion that standard of capacity in considering mental power should be adopted as standard in considering mental disease.
  - (w) Objection that latent mental unsoundness may exist considered.
  - (z) Will sustained.
9. Law settled by this judgment.
  10. Monomania must be distinguished from *eccentricity*. *Eccentricity* merely will not avoid a will.
  11. Will of *eccentric* man, however strange it may be, is such as, from his character and conduct, would be expected.
  12. Case of *Morgan v. Boys*.
  13. Case of *Austin v. Graham*. *Eccentric* will sustained on appeal.

1. Monomania is said to consist in a mental or moral perversion, or in both, in regard to some particular subject or class of subjects; while, in regard to others, the persons seems to have no such morbid affection. (a) It is not supposed the mind is altogether quiet and sound at such times, upon any subject; but apparently so upon some subjects, and not upon others. The development of its infirmity is exhibited, exclusively, upon particular subjects. The degrees of monomania are very various. In many cases the person is entirely capable of transacting

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(a) 1. Redf. Wills, 70-71.

BOOK II. any matters of business out of the range of his peculiar  
 CHAP. VII. infirmity ; and he often manifests considerable sagacity  
 Sect. III. and forecast in keeping the particular subject of his delusions from the knowledge of others. But, more commonly, he is not conscious of entertaining opinions different from the mass of men, even upon the particular subjects of his delusion ; and refuses to be convinced of labouring, in any degree, under mental unsoundness. (a)

2. Such being the definition of monomania, it is evident that a will may be made by a monomaniac which may be entirely unconnected with and uninfluenced by the testator's infirmity ; whilst other wills may be the direct result of, or may be intimately connected with, the disorder existing in the testator's mind. Cases of both kinds have engaged the attention of the Courts.

3. *Greenwood's* case furnishes a remarkable instance of a will, in making which the testator was directly influenced by delusion. Of this case Lord Eldon gives the following account. (b) He (Mr. Greenwood) was bred to the bar, and acted as chairman at the quarter sessions ; but, becoming diseased, and receiving in a fever a draught from the hands of his brother, the delirium taking its ground then, connected itself with that idea ; and he considered his brother as having given him a potion with a view to destroy him. He recovered in all other respects, but that morbid image never departed ; and that idea appeared connected with the will, by which he disinherited his brother ; nevertheless, it was considered so necessary to have some precise rule, that, though a verdict was obtained in the Common Pleas against the will, the judge strongly advised the jury, on a second trial, to find the other way, and they did accordingly find in favour of the will.

(a) 1. Redf. Wills, 70-71, 71-72

(b) *White v. Wilson*, 13 Ves. 89.

4. The case of *Dew v. Clark* (a) is a leading authority on the subject of monomania, as connected with the power of testamentary disposition. In that case the testator's daughter pleaded, in opposition to the will of her father, that, besides labouring under mental perversion in some other particulars, especially on religious subjects, the deceased had an insane aversion to her (the daughter), and was actuated solely by that illusion to dispose of his property in the manner in which it was purported to be conveyed by the contested will. This plea was resisted by those supporting the will, as being inadmissible, but was allowed by Sir John Nicholl, by whom the whole subject is ably reviewed. The learned judge remarked: "She (the daughter) must be apprised however as well that the burden of proof rests with her, as that this burden, in my judgment, is, from the very nature of the case, a pretty heavy one. The present, indeed, may be less difficult to make out than *Greenwood's* case in one respect, as the delusion under which this deceased is charged to have laboured towards the complainant, is alleged to have been coupled with something of an insane feeling in other particulars, especially on the subject of religion; although here, as in *Greenwood's* case, the general capacity is, in substance, unimpeached.

(a) "But she must understand that no course of harsh treatment—no sudden bursts of violence—no display of kind or even unnatural feeling merely, can avail in support of her allegation; she can only prove it by making a clear case of antipathy, clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity.

"It was said that 'partial insanity' was unknown to law. The observation could only have arisen from

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BOOK II. mistaking the sense in which the Court used that term.  
 CHAP. VII. It was not meant that a person could be partially insane  
 Sect. III. and sane at the same moment of time. To be sane, the  
 mind must be perfectly sound ; otherwise it is unsound.  
 All that was meant was, that the delusion may exist only  
 on one or more particular subjects. In that sense the  
 very same term is used in no less an authority than Lord  
 Hale, who says, ' There is a partial insanity of mind and  
 a total insanity. The former is either in respect to things  
*quoad hoc vel illud insanire*. Some persons that have a  
 competent use of reason in respect of some subjects, are  
 yet under a particular *dementia* in respect of some parti-  
 cular discourses, subjects, or applications. Or else it is  
 partial in respect of degrees ; and this is the condition of  
 very many, especially melancholy persons, who, for the  
 most part, discover their defect in excessive fears and  
 griefs, and yet are not wholly destitute of the use of rea-  
 son ; and this partial insanity seems not to excuse them  
 in the committing of any offence for its matter capital ;  
 for doubtless, most persons that are felons of themselves,  
 and others, are under a degree of partial insanity when  
 they commit these offences.' It is very difficult to define  
 the invisible line that divides perfect and partial insanity ;  
 but it must rest upon circumstances duly to be weighed  
 and considered both by judge and jury, lest on the one  
 side there be a kind of inhumanity towards the defects of  
 human nature ; or, on the other side, too great an indul-  
 gence given to great crimes.

(c) " The first point for consideration, and which should be  
 distinctly ascertained, as far as can be fixed, is what is the  
 test and criterion of unsound mind, and where eccentricity  
 and caprice ends, and derangement commences. Derange-  
 ment assumes a thousand different shapes, as various as  
 the shades of human character. It shows itself in form



very dissimilar both in character and degree. It exists in all imaginable varieties, from the frantic maniac chained down to the floor, to the person apparently rational on all subjects and in all transactions save one; and whose disorder, though latently perverting the mind, yet will not be called forth except under particular circumstances, and will show itself only occasionally. We have heard of persons at large in Bedlam, acting as servants in the institution, showing other maniacs and describing their cases, yet being themselves essentially mad. We have heard of the person who fancied himself Duke of Hexham, yet acted as agent and steward to his own committee. It is further observable that persons under disorder of mind have yet the power of restriction from respect and awe. Both toward their keepers and toward others in different relations they will control themselves. There have been instances of extraordinary cunning in this respect, so much as even to deceive the medical and other attendants, by persons who, on effecting their purpose, have immediately shown that their disorder existed undiminished.

(*d.*) "It has probably happened to most persons who have made a considerable advance in life, to have had personal opportunities of seeing some of these varieties, and these intermediate cases between eccentricity and absolute frenzy—maniacs, who, though they could talk rationally, and conduct themselves correctly and reason rightly, nay, with force and ability, on ordinary subjects, yet, on others, were in a complete state of delusion—which delusion no arguments or proofs could remove. In common parlance, it is true, some say a person is mad, when he does any strange or absurd act; others do not conceive the term 'madness' to be properly applied unless the person is frantic.

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Book II. (e) "As far as my own observation and experience can  
 CHAP. VII. direct me, aided by opinions and statements I have heard  
 Sect. III. expressed in society, guided also by what has occurred in  
 these and in other courts of justice, or has been laid down  
 by medical and legal writers, the true criterion is, *where*  
*there is delusion of mind there is insanity*: that is, when  
 persons believe things to exist which exist only, or at least  
 in that degree exist only, in their own imagination, and of  
 the non-existence of which neither argument nor proof can  
 convince them, they are of unsound mind; or, as one of the  
 counsel accurately expressed it, 'It is only the belief of  
 facts which no rational person would have believed, that  
 is insane delusion.' This delusion may, sometimes, exist  
 on one or more particular subjects, though generally, there  
 are other concomitant circumstances—such as eccentricity,  
 irritability, violence, suspicion, exaggeration, inconsis-  
 tency, and other marks and symptoms which may tend  
 to confirm the existence of delusion, and to establish its  
 insane character.

(f) "Medical writers have laid down the same criterion  
 by which insanity may be known. Dr. Battie, in his cele-  
 brated treatise 'On Madness,' thus expresses it. After  
 stating what is not properly madness, though often ac-  
 companying it, namely, either too lively or too languid a  
 perception of things, he proceeds: 'But *qui species aliarum*  
*veris capiet commotus habebitur*;' and this by all man-  
 kind as well as the physician, no one ever doubting  
 whether the perception of objects not really existing,  
 or not really corresponding to the senses, be a certain  
 sign of madness. Therefore deluded imagination is not  
 only an indisputable, but an essential characteristic of  
 madness.

(g) "Deluded imagination, then, is insanity. Mr. Locke,  
 who practised for a short time as a physician, though

more distinguished as a philosopher, thus expresses himself in his highly esteemed work on the 'Human Understanding': 'Madmen, having joined together some ideas very wrongly, mistake them for truths. By the violence of their imaginations, having taken their fancies for realities, they make right deductions from them. Hence it comes to pass that a man who is of a right understanding in all other things, may, in one particular, be as frantic as any in Bedlam. Madmen put wrong ideas together, and so make wrong propositions, but argue and reason rightly from them.'

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(h) "Here, again, the putting wrong ideas together, mistaking them for truths, and mistaking fancies for realities, is Mr. Locke's definition of madness; and he states that insane persons will reason rightly at times, and yet still are essentially mad, and that they may be mad on one particular subject only.

(i) "I shall refer to only one other medical authority; but he is a person of great name as connected with mental disorder—I mean Dr. Francis Willis. In a recent publication by this gentleman, there occur passages not undeserving of my attention. The work is entitled, 'A Treatise on Mental Derangement,' being the substance of the Gulstonian lecture delivered before the College of Physicians in the year 1822, and published in the month of March, 1823. Preceding his work, he gives a list of authors whom he has consulted, and he seems to have referred to almost every writer on the subject, ancient and modern. He has also personally had great practice in the particular disorder, as well as the advantage of acquiring much knowledge from the distinguished experience of his family. I will first refer to a passage where he points out the difference between an unsound mind and a weak mind.

(k) "A sound mind is one wholly free from delusion.

BOOK II. Weak minds only differ from strong ones in the extent  
 CHAP. VII. and power of their faculties ; but unless they betray sym-  
 Sect. III. toms of delusion, their soundness cannot be questioned.  
 An unsound mind is marked, on the contrary, by delu-  
 sion, by an apparent insensibility to, or perversion of,  
 those feelings which are peculiarly characteristic of our  
 nature. Some lunatics, for instance, are callous to a just  
 sense of affection, decency or honour ; they hate those  
 without a cause, who were formerly most dear to them ;  
 others take delight in cruelty ; many are more or less of-  
 fended at not receiving that attention to which their de-  
 lusions persuade them they are entitled. Retention of  
 memory, display of talents, enjoyment of amusing games,  
 and an appearance of rationality on various subjects, are  
 not inconsistent with unsoundness of mind ; hence, some-  
 times, arises the difficulty of distinguishing between san-  
 ity and insanity."

5. The cases referred to, and numerous other cases, both in the English and American Courts, have clearly established the proposition, that, whenever it appears that the will is the direct offspring of the partial insanity or monomania, under which the testator was labouring, it should be regarded as invalid, though his general capacity be unimpaired (a).

6. It was reserved for Lord Brougham, in the case *Waring v. Waring* (b) to give weighty authority to the doctrine, that any person, labouring under delusion or monomania, to any extent, or upon any subject, is not to be regarded as competent to execute a valid will.

7. This doctrine seems to have been accepted as law by Sir J. P. Wilde, in the recent case of, *Smith v. Tebbitt*

(a) 1 Redf. Wills 78-79. *Potts v. House*, 6 Ga. 324. *Townshend v. Townshend*, 7 Gill 10. *Boyd v. Eby*, 8 Watts, 71. *Leech v. Leech*,

11 Penn. Law J., 179.

(b) 6 Moo. P. C. 349 ; S. C. 12 Jur. 947.

(a), a case which on other points, deserves careful consideration. The learned judge remarks (b), "A person who is affected by monomania, although sensible and prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will. This has been clearly decided in the several cases quoted at the bar, of which it is only necessary to name that of *Waring v. Waring* (c). It is needless to travel over the paths by which this conclusion has been reached. It is properly the starting point in such an enquiry as the present. For I conceive the decided cases to have established this proposition: that, if disease be once shewn to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable. Further; that the same result follows, though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the Court."

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8. It is satisfactory however to be able to state that the doctrine in question which was never accepted by the profession as sound law, has been completely overturned by the recent case of *Banks v. Goodfellow* (d). The judgment in this case delivered by Chief Justice Cockburn contains a complete review of the authorities on the subject of insanity. The learned Chief Justice, after stating the facts of the case, proceeds as follows (e).

(a) "The question whether partial unsoundness, not affecting the general faculties, and not operating on the

(a) L. R. 1 Prob. 398. 36 L. J. P. 97. 16 L. T. N. S. 841.  
(b) At p. 401, L. R.  
(c) 6 Moo. P. C. 341.  
(d) L. R. 5 Q. B. 549. 39 L. J. Q. B. 237. 22 L. T. N. S. 813.  
(e) The great importance and the instructive character of this remarkable judgment are the author's apology for its insertion in the text.

BOOK II. mind of a testator in regard to the particular testamen-  
 CHAP. VII. tary disposition, will be sufficient to deprive a person of  
 Sect. III. the power of disposing of his property, presents itself  
 here for judicial decision, so far as we are aware, for the  
 first time. It is true that, in the case of *Waring v.*  
*Waring (a)*, the Judicial Committee of the Privy Council,  
 and, in the more recent case of *Smith v. Tebbitt (b)*, Lord  
 Penzance, in the Court of Probate, have laid down a  
 doctrine, according to which any degree of mental un-  
 soundness, however slight, and however unconnected with  
 the testamentary disposition in question, must be held  
 fatal to the capacity of a testator. But in both these  
 cases, as we shall presently shew, the wide doctrine  
 embraced in the judgment was wholly unnecessary to  
 the decision, and we therefore feel ourselves warranted,  
 and indeed bound, to consider the question as one not  
 concluded by authority, and on which we are called upon  
 to form our own judgment. The question is one of equal  
 importance and difficulty, and we have given it our best  
 consideration.

(b) "The text-writers throw no light upon the point. They content themselves with stating in general terms that to be capable of making a will a man must be of sound disposing mind and memory, and that persons non compos cannot make a will; but they are silent as to the degree of mental disturbance which will amount to a want of disposing mind and memory. The cases prior to *Waring v. Waring (a)*, in which the law on the subject of mental unsoundness, as affecting the capacity to make a will, has come into question, are by no means numerous. It may be as well to pass them in review.

(c) "In *Combe's Case (c)* it is said to have been agreed

(a) 6 Moo. P. C. 341.  
 (b) L. R. 1 Prob. 398.

(c) Moore, 759; S. C. 8 Vin-  
 Ab. 43, No. 22.

by the judges, 'that sane memory for the making of a will is not always where the party can in some things answer with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the will is void.' So, again, in the *Marquis of Winchester's Case* (a), 'By the law, it is not sufficient that the testator be of memory, when he makes the will, to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason.' In the case of *Greenwood v. Greenwood* (b), an action brought to recover estates under a will, the validity of which was disputed, the principal indication of insanity relied on being a strange aversion on the part of the testator towards his only brother, his heir at law, and a groundless suspicion of the latter having attempted to poison him, Lord Kenyon, in charging the jury, said: 'I take it a mind and memory competent to dispose of property, when it is a little explained, perhaps may stand thus:—having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind, so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will.' In other cases, such as the well-known case of *Dew v. Clark* (c), the insane delusion had a direct bearing on the provisions of the will. In such cases, the delusion being once proved, and its connection with the will being manifest, there could be no difficulty in setting aside the will. Cases of this description afford little or no assistance towards the solution of the question before us.

(a) 6 Rep. 23.

(b) 3 Curt. App. xxx.

(c) 3 Add. 79; Haggard's Report of Judgment, p. 19.

BOOK II. Again, other cases occurring prior to the case of *Waring*  
 CHAP. VII. v. *Waring* (a), such as *The Attorney-General v. Parnter*  
 Sect. III. (b) and *Cartwright v. Cartwright* (c), had reference to the effect to be given to a lucid interval at the time of making the will, rather than to the degree of mental unsoundness which would constitute testamentary incapacity. The judgment in the latter case is, however, not unworthy of attention. The case was a remarkable one, from the fact that the will had been made by a person actually confined in a lunatic asylum, and who was undoubtedly insane both before and after the making of the will; nevertheless it was upheld. Sir William Wynne, the then Judge of the Prerogative Court of Canterbury, in giving judgment, uses language tending strongly to shew that, in his opinion, the rationality of the act done affords an effectual test of the mental capacity of the party doing it. He says (d): 'I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself: that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to shew that the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne states it to be so. The manner he has laid down is (it is in the part (e) in which he treats of what persons may make a will):

(a) 6 Moo. P. C. 341.  
 (b) 3 Bro. C. C. 441.  
 (c) 1 Phillim. 90, 100.

(d) 1 Phil. at p. 100.  
 (e) Swinb. Pt. 2, s. 3.



‘If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions; and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.’ ‘Unquestionably,’ Sir William Wynne continues, ‘there must be a complete and absolute proof the party who had so framed it did it without any assistance. If the fact be so that he has done as rational an act as can be, without any assistance from another person, what there is more to be proved I don’t know, unless the gentleman could prove by any authority, or law, what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that. All that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient.’

(d) “Without going to the length of adopting to its full extent what is here said as to the effect of the rational character of the will, or at all saying that effect can be given to the rationality of the disposition beyond that which is due to it as evidence of the sanity of the testator, we advert to this case and the judgment of Sir William Wynne as shewing that a more indulgent view

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BOOK II. of the effect of insanity, as affecting testamentary incapacity, was then taken than has latterly prevailed.

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(e) "We come now to the case of *Waring v. Waring* (a) (since followed by that of *Smith v. Tebbitt* (b) in which the doctrine now contended for on behalf of the plaintiff was for the first time laid down. It may be shortly stated thus: To constitute testamentary capacity soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties if it labours under any delusion arising from such disorder though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence.

(f) "As has already been observed, neither in *Waring v. Waring* (a) nor in *Smith v. Tebbitt* (b), was the doctrine thus laid down in any degree necessary to the decision. Both these were cases of general, not of partial insanity; in both the delusions were multifarious, and the wildest and most irrational character, abundant indicating that the mind was diseased throughout. both there was an insane suspicion or dislike of persons who should have been objects of affection; and, what still more important, in both it was palpable that delusions must have influenced the testamentary disposition impugned. In both these cases, therefore, there existed ample grounds for setting aside the will without resorting to the doctrine in question. Unable to con- in it, we have felt at liberty to consider for ourselves principle properly applicable to such a case as the present. We do not think it necessary to consider the present

(a) 6 Moo. P. C. 341.

(b) L. R. 1 Prob. 31

assumed in *Waring v. Waring* (a), that the mind is one and indivisible, or to discuss the subject as matter of metaphysical or psychological inquiry. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed;—that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts

BOOK II.  
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(a) 6 Moo. P. C. 341.

BOOK II. or functions is affected by local disease, may be said to be  
 CHAP. VII. unsound, though all its other members may be healthy,  
 Sect. III. and their powers or functions unimpaired. But the ques-  
 tion still remains, whether such partial unsoundness of  
 the mind, if it leaves the affections, the moral sense, and  
 the general power of the understanding unaffected, and is  
 wholly unconnected with the testamentary disposition,  
 should have the effect of taking away the testamentary  
 capacity.

(g) " We readily concede that where a delusion has  
 had, as in the case of *Dew v. Clark* (a), or is calculated to  
 have had, an influence on the testamentary disposition, it  
 must be held to be fatal to its validity. Thus if, as occurs  
 in a common form of monomania, a man is under a delusion  
 that he is the object of persecution or attack, and makes a  
 will in which he excludes a child for whom he ought to  
 have provided; though he may not have adverted to that  
 child as one of his supposed enemies, it would be but reason-  
 able to infer that the insane condition had influenced him in  
 the disposal of his property. But, in the case we are  
 dealing with, the delusion must be taken neither to have  
 had any influence on the provisions of the will, nor to  
 have been capable of having any; and the question is,  
 whether a delusion, thus wholly innocuous in its results  
 as regards the disposition of the will, is to be held to have  
 the effect of destroying the capacity to make one.

(h) " The state of our own authorities being such as we  
 have shown, we have turned to the jurisprudence of other  
 countries, as on a matter of common juridical interest, to see  
 whether we could there find any assistance towards the  
 solution of the question. We have, however, derived but  
 little advantage from the inquiry. The Roman law, the

(a) 3 Add. 79, and Haggard's Report of the Judgment.

great storehouse of juridical science, is as vague and general on the subject as our own. The madman (*furiosus*), and the person of defective intelligence (*mente captus*), are declared incapable of making a testament; but as to what shall constitute madness or defectiveness of intelligence, sufficient to prevent the exercise of the testamentary right, the authorities are silent. The continental codes are equally general in their terms, simply providing, either that persons must be of sound mind to make a will, or that persons of unsound mind shall be disabled from doing so. The older writers appear not to have been alive to the distinction between total and partial unsoundness as affecting testamentary capacity. In recent times, however, the question has been mooted by eminent and distinguished jurists, but unfortunately with a marked discordance of opinion. M. Troplong, in his well known work, '*Le Droit Civil Expliqué*' (a), and M. Sacase, in a treatise entitled '*La Folie considérée dans ses rapports avec la Capacité Civile*' (b), have adopted the doctrine of the unity and indivisibility of the mind, and the consequent unsoundness of the whole if insane delusion anywhere exist. Writers equally entitled to respect have maintained the contrary view. Legrand du Saule, in a very able work, entitled '*La Folie devant les tribunaux*' (c), contends that 'hallucinations are not a sufficient obstacle to the power of making a will, if they have exercised no influence on the conduct of the testator, have not altered his natural affections, or prevented the fulfilment of his social and domestic duties; while, on the other hand, the will of a person affected by insane delusion ought not to be admitted if he has disinherited his family without cause, or

BOOK II.  
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(a) *Commentaire sur les donations entre vifs et testaments*, tom. ii. §§ 451-7.

(b) P. 16.  
(c) P. 146.

BOOK II. looked on his relations as enemies, or accused them of seek-  
 CHAP. VII. ing to poison him, or the like. In all such cases, where the  
 Sect. III. delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails: the will of the party is no longer under the guidance of reason, it becomes the creature of the insane delusion.' M. Demolombe, in his great work, the '*Cours de Code Napoleon*' (a), M. Castlenau, in his treatise, '*Sur l'Interdiction des Aliénés*,' and Hoffbauer, in his remarkable work on Medical Jurisprudence relating to Insanity, have maintained the doctrine that monomania, or partial insanity, not affecting the testamentary disposition, does not take away the testamentary capacity. Mazzoni, in a recent work, entitled '*Istituzioni di diritto civile Italiano*' (b), lays it down that 'monomania is not an unsoundness of mind which absolutely and necessarily takes away testamentary capacity, as the monomaniac may have the perfect exercise of his faculties in respects of all subjects beyond the sphere of the partial derangement.'

(i) "None of these writers, however, have gone very deeply into the subject, or considered it with reference to the principles on which mental alienation should be held to form a ground for taking away testamentary capacity. The older jurists were content to say that an insane person was incapable of making a testament, because he has no mind, '*quia mente caret*,' as it is said in the *Institutes* (c); or because he could not have a will, and therefore was incapable of declaring his ultimate will as to the disposal of his property—positions obviously unsatisfactory when the fact becomes recognized that a man may labour under harmless delusions, which leave the other faculties

(a) *Traité des donations entre vifs et testaments*, liv. iii. tit. 2, ch. ii. § 339. Vol. i. p. 369.

(b) *Liv. iii. tit. 2, s. 3.*

(c) *Instit. lib. ii, tit 12, 1.*

of his mind unaffected, and leave him free to make a disposition of his property uninfluenced by their existence. In our day the doctrine has sprung up of the unity and indivisibility of the mind, but the ground on which insanity should cause incapacity appears to have been overlooked in the reasoning on which it is founded. It is important to recall it.

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(k) "The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these considerations. On the con-

BOOK II. trary, had they stood alone, it is probable that the power  
 CHAP. VII. of testamentary disposition would have been withheld,  
 SECT. III. and that the distribution of property after the owner's  
 death would have been uniformly regulated by the law  
 itself. But there are other considerations which turn the  
 scale in favour of the testamentary power. Among those,  
 who, as a man's nearest relatives, would be entitled to  
 share the fortune he leaves behind him, some may be  
 better provided for than others; some may be more de-  
 serving than others; some from age, or sex, or physical  
 infirmity, may stand in greater need of assistance. Friend-  
 ship and tried attachment, or faithful service, may have  
 claims that ought not to be disregarded. In the power  
 of rewarding dutiful and meritorious conduct, paternal  
 authority finds a useful auxiliary; age secures the respect  
 and attentions which are one of its chief consolations. As  
 was truly said by Chancellor Kent, in *Van Alst v. Hunter*  
 (a), 'It is one of the painful consequences of extreme old  
 age that it ceases to excite interest, and is apt to be left  
 solitary and neglected. The control which the law still  
 gives to a man over the disposal of his property is one of  
 the most efficient means which he has in protracted life  
 to command the attentions due to his infirmities.' For  
 these reasons the power of disposing of property in an-  
 ticipation of death has ever been regarded as one of the  
 most valuable of the rights incidental to property, while  
 there can be no doubt that it operates as a useful incentive  
 to industry in the acquisition of wealth, and to thrift and  
 frugality in the enjoyment of it. The law of every coun-  
 try has therefore conceded to the owner of property the  
 right of disposing by will either of the whole, or, at all  
 events, of a portion, of that which he possesses. The

(a) 5 Johns. N. Y. Ch. Rep. at p. 159



Roman law, and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

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(*l*) "It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature shall be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

(*m*) "Here, then, we have the measure of the degree of mental power which should be insisted on. If the human

BOOK II. instincts and affections, or the moral sense, become per-  
 CHAP. VII. verted by mental disease ; if insane suspicion, or aversion,  
 Sect. III. take the place of natural affection ; if reason and judgment are lost, and the mind become a prey to insane delusions, calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is the result ; ought we, in such case, to deny to the testator the capacity to dispose of his property by will ?

(n) “It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right ? It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be

present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.

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(o) "It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause—namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. 'It is enough if,' to use the words of Sir Edward Williams, in his work on Executors, 'the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.' (a) 'Non sani tantum,' says Voet in his Commentary on the Pandects (b), founding himself on the language of the Code, Book 6, tit. 23, i. 15, 'sed et in agone mortis positi, seminece, ac balbutiente lingua voluntatem promentes, recte testamenta condunt, si modo mente adhuc valeant.'

(p) "This part of the law has been extremely well treated in more than one case in the American Courts.

"In the case of *Harrison v. Rowan* (c), in the Uni-

(a) 1 Williams Exors. 6th ed. p.

37. m. r.

(b) Lib. 28, tit. 1. s. 36.

(c) 3 Washington, at p. 585 re-

ferred to in *Sloan v. Maxwell*, 2 H. W. Green (New Jersey Ch. Rep.) at p. 570.

BOOK II.     ted States District Court for the district of New Jersey,  
 CHAP. VII.   the law was thus laid down by the presiding judge: 'As  
 SECT. III.   to the testator's capacity, he must, in the language of the  
               law, have a sound and disposing mind and memory. In  
               other words, he ought to be capable of making his will  
               with an understanding of the nature of the business in  
               which he is engaged, a recollection of the property he  
               means to dispose of, of the persons who are the objects of  
               his bounty, and the manner in which it is to be distribu-  
               ted between them. It is not necessary that he should  
               view his will with the eye of a lawyer, and comprehend  
               its provisions in their legal form. It is sufficient if he has  
               such a mind and memory as will enable him to under-  
               stand the elements of which it is composed, and the dis-  
               position of his property in its simple forms. In deciding  
               upon the capacity of the testator to make his will, it is  
               the soundness of the mind, and not the particular state of  
               the bodily health, that is to be attended to; the latter  
               may be in a state of extreme imbecility, and yet he may  
               possess sufficient understanding to direct how his property  
               shall be disposed of; his capacity may be perfect to dis-  
               pose of his property by will, and yet very inadequate to the  
               management of other business, as, for instance, to make  
               contracts for the purchase or sale of property. For, most  
               men, at different periods of their lives, have meditated  
               upon the subject of the disposition of their property by  
               will, and when called upon to have their intentions com-  
               mitted to writing, they find much less difficulty in declar-  
               ing their intentions than they could in comprehending  
               business in some measure new."

(q) "In the case of *Den v. Vancleve* (a) the law was  
 thus stated: 'By the terms "a sound and disposing mind

(a) 2 Southard, at p. 660.

and memory" it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory.'

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(r) "In the subsequent case of *Stevens v. Vancleve* (a) it is said: 'The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of,

(a) 4 Washington, at p. 267

BOOK II. and there is probably no person who has not arranged  
 CHAP. VII. such a disposition in his mind before he committed it to  
 Sect. III. writing. The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

(s) This view of the law is fully adopted by the Court in the case of *Sloan v. Maxwell* (b), and is there stated to have been approved by Chancellor Vroom in a case to the will of Tace Wallace, which, however, is not reported. It appears to have had the sanction of Chancellor Kent, in the case of *Van Alst v. Hunter* (c), already referred to.

(t) In a case of *Harwood v. Baker* (d), before the Judicial Committee of the Privy Council, in which case a will had been executed by a testator on his deathbed, in favour of a second wife, to the exclusion of the other members of his family, he being in a state of weakness and impaired capacity from disease producing torpor of the brain, and rendering his mind incapable of exertion unless roused, Erskine, J., delivered the judgment of the Court in these terms: (a) 'Their lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend

(a) 2 H.W. Green (N.J. Chan. R.) 563.

(b) 5 Johns. N. Y. Ch. Rep. at p. 159.

(c) 3 Moo P. C. 282.

(d) 3 Moo. P. C. 291.

the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property ; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one ; and more especially, when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration. And, therefore, the question which their Lordships propose to decide in this case is, not whether Mr. Baker knew, when he executed this will, that he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice of the disposition might cast down some light upon the question as to his capacity.'

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(u) "From this language it is to be inferred that the standard of capacity in cases of impaired mental power is, to use the words of the judgment, the capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding. Why should not this standard be also applicable to mental unsoundness produced by mental disease ?

(v) "It may be said that the analogy between the two cases is imperfect ; that there is an essential difference between unsoundness of mind arising from congenital

BOOK II. defect, or supervening infirmity, and the perversion of  
CHAP. VII. thought and feeling produced by mental disease, the  
Sect. III. latter being far more likely to give rise to an inofficious  
will than the mere deficiency of mental power. This is,  
no doubt, true, but it becomes immaterial on the hypo-  
thesis that the disorder of the mind has left the faculties,  
on which the proper exercise of the testamentary power  
depends, unaffected, and that a rational will, uninfluenced  
by the mental disorder, has been the result.

(w) "It is said, indeed, by those who insist that any degree of unsoundness should suffice to take away testamentary capacity, that where insane delusion had shewn itself, it is always possible, and indeed may be assumed to be probable, that a greater degree of mental unsoundness exists than has actually become manifest. But this view, which is by no means universally admitted, is unsupported by proof, and must be looked upon as matter of speculative opinion. It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered form, would be little likely to have any influence on the disposition of the will. No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances be-



comes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an enquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed and guided by a judge. In the case before us two delusions disturbed the mind of the testator, the one that he was pursued by spirits, the other that a man long since dead came personally to molest him. Neither of these delusions—the dead man not having been in any way connected with him—had, or could have had any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir-at-law, and therefore would have taken the property without its being devised to her, was yet rational in this, that it was made in favour of a niece, who lived with him, and who was the object of his affection and regard. And we must take it on the finding of the jury that irrespectively of the question of these dormant delusions, the testator was in possession of his faculties when the will was executed.

(x) "Under these circumstances, we see no ground for holding the will to be invalid. If, indeed, it had been possible to connect the dispositions of the will with the delusions of the testator, the form in which the case was

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BOOK II. left to the jury might have been open to exception. It  
 CHAP. VII. may be, as was contended on the part of the plaintiff,  
 Sect. III. that in a case of unsoundness, founded on delusion, but  
 which delusion was not manifested at the time of making  
 the will, it is a question for the jury whether the delusion  
 was not latent in the mind of the testator. But, then, for  
 the reasons we have given in the course of this judgment,  
 we are of opinion that a jury should be told, in such a  
 case, that the existence of a delusion, compatible with  
 the retention of the general powers and faculties of the  
 mind, will not be sufficient to overthrow the will, unless  
 it were such as was calculated to influence the testator in  
 making it."

9. This able and elaborate judgment completely exhausts the subject of monomania, and will, no doubt, long continue to be a leading authority on the subject of insanity in its various forms.

10. Monomania must be carefully distinguished from mere *eccentricity*. No case has yet gone the length of avoiding a will on the mere ground of eccentricity in the testator. The distinction between monomania and eccentricity is said to consist in the fact that the eccentric man is aware of his peculiarity, and persists in his course from choice, and in defiance of the popular sentiment, while the monomaniac verily believes he is acting in conformity to the most wise and judicious counsels, and often seems to have lost all control over his voluntary powers, and to be the dupe and victim of some demon (a).

11. The will of an eccentric man, however strange and unaccountable it may seem upon the ordinary grounds of human judgment and experience, is, nevertheless, such an instrument as those acquainted with the character and

(a) 1 Redf. Wills, 71-72.

conduct of the testator in former years, would be prepared in some sense to expect; while, on the other hand, the will of an insane man, especially where it is tinged with the peculiar colouring of the testator's fancies or delusions, is often strangely at variance with all the leading characteristics of the testator in his formerly healthy and sound condition. Eccentric habits, suddenly acquired, are properly regarded as evidence of insanity (a).

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12. The case of *Morgan v. Boys* (b) is an illustration of eccentricity carried into the testamentary act. The testator devised his property to a stranger, thus wholly disinheriting the heir, or next of kin, and directed that his executors should "cause some parts of his bowels to be converted into fiddle strings, that others should be sublimed into smelling-salts, and that the remainder of his body should be vitrified into lenses for optical purposes." In a letter attached to the will, the testator said: "The world may think this to be done in a spirit of singularity or whim, but I have a mortal aversion to funeral pomp, and I wish my body to be converted into purposes useful to mankind." The testator was shown to have conducted his affairs with great shrewdness and ability, and, so far from being imbecile, he had always been regarded by his associates through life as a person of indisputable capacity. Sir Herbert Jenner Fust regarded the proof as not sufficient to establish insanity; it amounted to nothing more than eccentricity in his judgment (c).

13. In another remarkable case (d), the difference between insanity and eccentricity was considered by the Courts. The testator was a native of England, but had lived in the East, and was familiar with Eastern habits

(a) Taylor Med. Jur. 632, 656, 6th Ed. 1 Redf. Wills, 84-85.

(b) Taylor Med. Jur. 657 1838.

(c) 1 Redf. Wills, 82-83.

(d) *Austen v. Graham*, 8 Moo. P. C. 493.

BOOK II. and superstitions, and professed his belief in the Mahom-  
 CHAP. VII. metan religion. He died in England, leaving a will, which,  
 Sect. III. after various legacies, gave the residue to the poor of Constantinople, and also toward erecting a cenotaph in that city, inscribed with his name, and bearing a light continually burning therein. The Prerogative Court pronounced the testator to be of unsound mind, principally upon the ground of this extraordinary bequest, which sounded to folly, together with the wild and extravagant language of the testator, proved by parol. But, on appeal, it was held that, as the insanity attributed to the testator was not monomania, but general insanity or mental derangement, the proper mode of testing its existence was to review the life, habits, and opinions of the testator, and, on such a review, there was nothing absurd or unnatural in the bequest, or anything in his conduct, at the date of the will, indicating derangement, and it was therefore admitted to probate (*a*).

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#### SECTION IV.

##### *Of Lucid Intervals.*

1. During lucid intervals testamentary capacity is restored.
2. If a lucid interval is established, the order of proof and presumption is inverted.
3. Lord Thurlow's definition of a lucid interval.
4. Lord Eldon's remarks upon this opinion.
5. Lord Thurlow's definition misunderstood by Lord Eldon.
6. Insanity being once proved, the presumption is that it continues to exist.
7. No particular measure of proof required to establish a lucid interval.
8. Great caution should be used in examining such proof.
9. Suicide not conclusive evidence of insanity.
10. Presumption of lucid interval stronger in case of delirium than in case of insanity.

(*a*) See also 1 Redf. Wills, 83-84; *sias v. Dyke*, Prerog. Court, May, 1852.  
 see also *Mudway v. Croft*, 3 Curt. 678,  
 1 L. T. 479. Taylor Ev. 658. *Ygle-*

ption in favour of a rational Will regularly executed.  
 al Will strong evidence of a lucid interval.

*Cartwright v. Cartwright.*

of Sir John Nicholl as to effect of rationality of Will.  
 labouring under delusions frequently instructed to  
 al them. Caution to be exercised in such cases.

g the existence of what is technically called a  
 rval," a person who has been afflicted with  
 restored to his testamentary capacity. If a  
 son have clear or calm intermissions, usually  
 id intervals," then, during the time of such  
 nd freedom of mind, he may make his testa-  
 ating executors, and disposing of his goods at  
 ).

ou can establish," said Sir William Wynne, in  
*Cartwright v. Cartwright* (b), "that the party  
 bitually by a malady of the mind has inter-  
 id if there was an intermission of the disorder  
 of the act, that being proved is sufficient, and  
 habitual insanity will not affect it; but the  
 is this, it inverts the order of proof and of pre-  
 for until proof of an habitual insanity is made,  
 ption is that the party agent, like all human  
 was rational; but where an habitual insanity,  
 l of the person who does the act, is established,  
 arty who would take advantage of an interval  
 ust prove it" (c).

Pt. 2, s. 3, pl. 3;  
 c. 8, s. 2; Wentw. c.  
 3d.; *Hall v. Warren*,  
 1d v. *Lewis*, 2 Cas.

a. 100  
 he doctrine laid down  
 low in *Att.-Gen. v.*  
*o. C. C.* 443, and Sir  
*all v. Warren*, 9 Ves.  
 Swinb. Pt. 2, s. 3, pl.  
 said, that if it be  
 he testator was once

mad, the law presumeth him to con-  
 tinue still in that case, unless the  
 contrary be proved. See also Go-  
 dolph. Pt. 1, c. 8, s. 2; *White v.*  
*Driver*, 1 Phillim. 88; *Groom v.*  
*Thomas*, 2 Hagg. 434; *Waring v.*  
*Waring*, 6 Moo. P. C. 341; S. C. 5  
 No. Cas. 296; 6 No. Cas. 388; *Gri-*  
*mani v. Draper*, Ibid. 418; *Johnson*  
*Blane*, Ibid. 422; *Fowles v. David-*  
*son*, Ibid. 461, 474; *Kemble v.*  
*Church*, 3 Hagg. 273.

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BOOK II. 3. Lord Thurlow, in defining a lucid interval, says  
 CHAP. VII "By a perfect interval, I do not mean a cooler moment,  
 Sect. IV. an abatement of pain or violence, or of a higher state of  
 torture, a mind relieved from excessive pressure; but an  
 interval in which the mind, having thrown off the disease,  
 had recovered its general habit" (a).

4. Regarding the opinion expressed by Lord Thurlow, Lord Eldon, in *ex parte Holyland* (b), remarks: "Lord Thurlow said that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property or with reference to such a case as this; for suppose the strongest mind, reduced by the delirium of a fever or any other cause to a very inferior degree of capacity, admitting of making a will of personal estate, (to which a boy of the age of fourteen is competent,) the conclusion is not just that, as that person is not what he had been, he should not be allowed to make a will of personal estate."

5. It must be observed that Sir W. Grant, in *Hall v. Warren* (c), does not appear to have understood Lord Thurlow in the same sense as Lord Eldon did in the preceding remarks, nor indeed does the report in Brown of the *Attorney-General v. Parnter* bear any such construction. "If general lunacy," said Sir W. Grant, "is established= they will be under the necessity of showing, according to= the *Attorney-General v. Parnter*, that there was no= merely a cessation of the violent symptoms of the disorder= but a restoration of the faculties of the mind sufficient to= enable the party soundly to judge of the act" (d).

(a) *Att.-Gen. v. Parnter*, 3 Bro.  
 C. C. 444.  
 (b) 11 Ves. 11.

(c) 9 Ves. 611.  
 (d) 1 Williams Exors. 21, 22.

6. If insanity other than mere delirium is shewn to exist, the presumption is that it continues to exist (*a*). The proof of a lucid interval, under such circumstances, lies upon those who set it up (*b*).

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7. No particular measure of proof is required for the establishment of a lucid interval. It must however be sufficient to encounter and overcome the presumption which naturally arises in the mind, after the person is once shown to have been in a confirmed state of mental unsoundness, that such state will continue (*c*).

8. It is said that great caution should be observed in examining the proof of a lucid interval (*d*), and such proof is a matter of great difficulty, because frequently the patient is, to outward appearance, rational whilst still insane (*e*). On the other hand, the Court must be on its guard against the impressions created in the minds of witnesses who have seen the testator whilst insane, and have acquired a strong opinion of his permanent incapacity, and disregarding mere opinions base its judgment upon the facts proved, and the acts of the testator (*f*).

9. Suicide is not conclusive evidence of insanity, even at the time of the act (*g*).

10. The probabilities, *a priori*, in favour of a lucid interval, are infinitely stronger in a case of delirium than in one of permanent proper insanity; and the difficulty of

(*a*) 1 Redf. Wills 112, 113.

(*b*) *White v. Wilson*, 13 Vesey, 87.

(*c*) 1 Redf. Wills 113, 115.

(*d*) Per Sir John Nicholl, in *White v. Driser*, 1 Phillim. 88.

(*e*) By Sir John Nicholl, in *Brogden v. Brown*, 2 Add. 445, and in *Ayre v. Hill*, 2 Add. 210.

(*f*) See observations of Sir John Nicholl in *Kindleside v. Harrison*, 2 Phillim. 459; and in *Evans v.*

*Knight*, 1 Add. 239. See also *Wood v. Wood*, 1 Phillim. 363; *Wheeler v. Alderson*, 3 Hagg. 605; *Tatham v. Wright*, 2 Russ. and M. 21, 22; *Steed v. Calley*, 1 Keen, 620.

(*g*) Taylor's Med. Jur. 680, 681; *Burrows v. Burrows*, 1 Hagg. 109; *Brooks v. Barrett*, 7 Pick. 94; *Chambers v. Queen's Proctor*, 2 Curt. 415; *Hoby v. Hobv*, 1 Hagg. 146; 1 Williams Exors. 19.

BOOK II. proving a lucid interval is less in the same exact proportion in the former than it is in the latter case (a).  
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SECT. IV. 11. If a testamentary paper, rational on the face of it, is shown to have been executed and attested as prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding; but if there are circumstances in the evidence which counterbalance that presumption, the Court will pronounce against it, unless, on the whole, the evidence was sufficient to establish affirmatively that the testator was of sound mind when he executed it (b).

12. And where a person afflicted with habitual insanity, with intermissions, makes a rational Will in a rational manner, such an act is strong, though not conclusive evidence of a lucid interval (c).

13. In the celebrated case of *Cartwright v. Cartwright* (d), Sir Wm. Wynne thus expressed his opinion on the subject under consideration: "The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the will. That I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to show the party did that which appears to be a rational act and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done (e). In my apprehension, when you are

(a) Per Sir John Nicholl, in *Brogden v. Brown*, 2 Add. 445. See also the observations of Dr. Lushington in *Dimes v. Dimes*, 10 Moo. P. C. 422-426.

(b) *Symes v. Green*, 1 S. & T. 401; 5 Jur. N.S. 742; 28 L.J.P. 83.

(c) *Nicholls v. Binns*, 1 S. & T. 239.

(d) 1 Phillim. 122.

(e) It is not, however, to be supposed that the learned judge here considers that every rational act rationally done is sufficient to prove lucid interval. It was the particular manner in which the act done in this case, which leads the judge to the conclusion that there was a lucid interval. 1



able completely to establish that, the law does not require you to go further; and the citation from Swinburne states it to be so. The manner he has laid it down is it is in the part in which he treats of what persons may make a Will) (a): The last observation is: 'If a lunatic person, or one that is beside himself at sometimes but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his clear and calm intermissions, and so the testament shall be adjudged good; yea, although it cannot be proved that the testator useth to have any clear and calm intermissions at all; yet, nevertheless, I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably there must be a complete and absolute proof that the party who had so formed it, did it without any assistance. If the fact be so, that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentleman could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the

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*Lane Exors.* 24 n(k); 2 Curt. 447, by Sir H. Jenner Fust in *Chambers v. The Queen's Proctor*. In *Bannatyne v. Bannatyne*, 2 Rob., 472, 501, Dr. Lushington, referring to the above passage in the judgment of Sir W. Wynne, said: "Though I cannot say I altogether

agree to that dictum, still it is entitled to great weight, and, to a certain extent, a rational act done in a rational manner, though not, I think, the strongest and best proof of a lucid interval, does contribute to the establishment of it."

(a) Swinb. Pt. 2, s. 3, pl. 14.

BOOK II. act done is perfectly proper, and that the party who is  
 CHAP. VII. alleged to have done it was free from the disorder at the  
 Sect. IV. time, that is completely sufficient."

14. In *Scruby v. Fordham (a)*, Sir John Nicholl stated the rule to be, that where a will is traced into the hands of a testator whose sanity is fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to the will there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character, broadly taken, of his act (b).

15. As persons labouring under delusions are frequently instructed to conceal them, should it appear in evidence that a testator, afflicted with insane delusions, has been thus instructed, and should the evidence to prove perfect recovery of capacity be doubtful, a will made by such a person, though rational in form and substance, should not be admitted to probate (c).

## SECTION V.

### *Effect of Drunkenness or Delirium on Testamentary Capacity.*

1. Intoxication to the extent of producing oblivion incapacitates a person from making a will. Swinburne's rule on the subject.
2. General rule of the Courts of Law and Equity as to the effect of intoxication.
3. Case of *Shaw v. Thackray* considered.
4. The question to be decided by the jury laid down in *Handley v. Stacey*.

(a) 1 Add. 90.

(b) See also *Chambers v. Queen's Proctor*, 2 Curt. 415, 451; *McAdam v. Walker*, 1 Dow. 178; 1 Williams Exors. 25. But see also as to the presumption where the disposition made by the will is unreasonable, though the will is made with accuracy, *Clark v. Lear*, March 1791, cited by Sir Wm. Wynne in 1 Phillim. 119. Observations of Sir John Nicholl in

*Evans v. Knight*, 1 Add. 237, 238. And for further cases as to the proof of lucid intervals, see *Coplan v. Coghlan*, cited 1 Phillim. 120; *Williams v. Goude*, 1 Hagg. 577; *Borlase v. Borlase*, 4 No. Cas. 106; Lord Brougham's observations in *Waring v. Waring*, 4 Moo. P. C. 351.

(c) *Dyce Sombre v. Troupe, Deane*, Ecc. Rep. 22.

5. Intoxication short of producing oblivion will not incapacitate.
6. The dispositions of the will may be considered ; but to defeat the will they must be extravagant and unreasonable.
7. Intoxication usually more temporary than delirium.
8. Insanity may be latent—Ebriety never.
9. Delirium from disease resembles insanity, but presumption of continued incapacity does not arise in former.



1. Persons may be afflicted with delirium from inflammation or stimulus, and while this state continues to such a degree as to overwhelm the reason and judgment, it produces a total incapacity to execute a will (a). It is a well-understood rule that intoxication, to the extent of producing mental oblivion, while that state continues, deprives the party of the ability to make a will. "He that is overcome by drink, during the time of his drunkenness is compared to a madman, and therefore, if he make his testament at that time, it is void in law ; which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding ; otherwise, if he be not clean spent, albeit his understanding is obscured and his memory troubled, yet he may make his testament being in that case" (b).

2. In cases of intoxication or habitual drunkenness, the rule adopted by the Courts of Law as well as those of Equity is, that a party is not to be held incompetent to do a binding act requiring consent, unless he is so completely under the dominion of delirium as not to understand the nature of the business in which he is engaged, and so be rendered incapable of giving his consent, or else so much weakened in his capacity and purpose as to be chiefly under the control of others (c).

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(a) 1 Redf. Wills, 62-63.

(b) Swinh. Pt. 2, s. 6 ; Godolph. Pt. 1, c. 8, s. 5 ; *Gore v. Gibson*, 13 M. & W. 623.

(c) 1 Redf. Wills, 90-92 ; Wharton & Stille, s. 36 *et seq.* ; Ray, Med. Jur. 390 ; *Cook v. Clayworth*, 18 Vesey, 12.

BOOK II. 3. In *Shaw v. Thackray* (a), which was a case of a bill  
 CHAP. VII. filed for specific performance of an agreement, into which  
 Sect. V. the defendant Thackray alleged that he had entered while  
 in a state of intoxication, V. C. Stuart thus stated the  
 doctrine of the Courts of Equity on the subject of drunk-  
 enness, as affecting the capacity of a person to make a  
 contract: "If a man, by habits of drunkenness, had en-  
 tirely destroyed his capacity as a man of understanding,  
 so far as to be incapable of executing a deed, any instru-  
 ment executed by him was entirely invalid; but, on the  
 other hand, a man in the habit of drinking to excess, but  
 who had not wholly destroyed his faculties, if he entered  
 into a contract with another individual, was not to derive  
 to himself any advantages from those habits which had  
 lowered him in the scale of humanity. The principles  
 acted upon in *Cook v. Clayworth* (b) were, that a party  
 being in liquor when he entered into an agreement, was no  
 reason for the Court to refuse a decree for specific perform-  
 ance, and they pointed out the rule to be acted on in  
 these cases. In *Corey v. Corey* (c), and subsequently in  
*Nagle v. Baylor* (d), the same rule had been acted on. The  
 course of the Court had been, in cases of this kind, that  
 it would not assist a person who had obtained or wished to  
 get rid of an agreement or deed on the mere ground of in-  
 toxication; but only where any contrivance was used to  
 draw him in to drink, or any unfair advantage taken of his  
 situation, or in that extreme state of intoxication which de-  
 prived a man of his reason, did the Court interfere" (e).

(a) 17 Jur. 1045.

(b) 18 Ves., 12.

(c) 1 Ves., Senr. 19.

(d) 3 Dru. & W. 60.

(e) See also *Lightfoot v. Heron*, 3 Y. & C. 586; *Butler v. Mulvihill*, 1 Bligh, 137; *Say v. Barwick*, 1 V. & B. 185; *Pitt v. Smith*, 3 Campb. 331; *M'Diarmid v. M'Diarmid*, 3 Bligh,

N. S. 374; *Gore v. Gibson*, 13 M. & W. 623; *Cann v. Cann*, 1 P. W. 724. See also the following American cases on same subject—*King v. Bryant*, 2 Hayw. 394; *Campbell v. Ketcham*, 1 Bibb. 406; *White v. Orr*, 3 Hayw. 82; *Taylor v. Patrick*, 1 Bibb. 168.

4. In a recent case (*a*) tried before the late Lord Campbell at nisi prius, the will being impeached on the ground that the testator's mind was impaired by drinking, and was under undue influence on the part of the devisee or his family, it appearing that the testator had been addicted to drinking, and had had delirium tremens a few days before the will was executed, and that the will was drawn up by the son of the devisee, and at his house, he being an old friend of the testator; it was held that the question was, whether the testator was sane and sensible, and able to understand the nature and contents of the will at the time it was executed; and that if the testator had really requested the son of the devisee to draw up the will, and it was his voluntary and spontaneous act, not under constraint, and free from force or fraud, and from imposition or importunity, there was no undue influence, and the will was valid.

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5. And in a recent case before the New York Court of Appeals (*b*), it was held that neither intoxication, nor the actual stimulus of intoxicating liquor, at the time of executing a will, incapacitates the testator unless the excitement be such as to disorder his faculties and pervert his judgment.

6. The dispositions of the will may be considered for the purpose of determining the testator's condition at the time of executing it. But in order to defeat the will upon this ground alone, such dispositions must not only be in some degree extravagant and unreasonable, but they must depart so far from what would be regarded as natural, as to appear fairly referrible to no other cause but a disordered intellect. The will of a confirmed drunkard, although executed after a protracted debauch, and although the tes-

(a) *Handley v. Stacey*, 1 F. & F.

(b) *Peck v. Carey*, 27 N. Y. R. 9.

BOOK II. tator had drunk several times during the day, at the time  
 CHAP. VII. of executing it, was, in the case referred to, confirmed (l)  
 Sect. V. 7. The incapacity produced by drink is more temporary

than the delirium of disease, and when the fit is off, the patient is at once restored to perfect reason ; and no presumption arises in regard to the continuation of the delirium of drunkenness, since it ceases almost at once unless the exciting cause is renewed.

8. In a case where it appeared that the testator was a person not properly insane or deranged, but habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects like a madman, it was held that, as the testator was not under the excitement of liquor, he was not to be considered as insane at the time of making his will ; and the will itself was accordingly established (m), and the Court pointed out the difference between the present case and one of actual insanity, *inasmuch as insanity may often be latent, whereas there can scarcely be such a thing as latent ebriety* ; and, consequently, in a case like the one under consideration, all that requires to be shown is the absence of the excitement at the time of the act done, or, at least, the absence of excitement in any such degree as would vitiate the act done (n).

9. Delirium from disease resembles insanity, but the same presumption of continued incapacity does not arise in cases of delirium as arises in cases of insanity or mania.

(l) *Peck v. Carey*, sup. See further as to the effect of intoxication, Taylor's Med. Jur. 676 ; Pothier on Obligations, 49 n.

(m) *Ayrey v. Hill*, 2 Add. 206. See also *Billinghurst v. Vickers*, 1 Phillim. 191.

(n) 2 Add. 210. See also *Wheeler v. Alderson*, 3 Hagg. 602-608. In

the case of *Rex v. Wright*, 2 Burr. 1099, a rule was obtained to show cause why a criminal information could not be exhibited against certain persons for a misdemeanor in using artifices in order to obtain a will from a woman addicted to, and almost destroyed by liquor. See notes on p. 40, 1 Williams Exors.

"Delirium," said Sir John Nicholls, in *Brogden v. Brown* (a), "is a fluctuating state of mind, created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is most commonly really sane. Hence, as also indeed from their greater presumed frequency in most instances in cases of delirium, the probabilities, à priori, in favour of a lucid interval, are infinitely stronger in a case of delirium than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less in the same exact proportion in the former than it is in the latter case, and has always been so held by the Court (b).

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## SECTION VI.

*Old Age.*

1. No particular age fixed by law at which testamentary capacity shall be deemed to have ceased.
2. Old age of itself not an incapacity.
3. Extreme old age raises a doubt of capacity.
4. Remarks of Chancellor Kent in *Van Alst v. Hunter*.  
n (c). Remarks of Judge Bradford in *Bleecker v. Lynch*.
5. Consideration of the capacity of an aged person to make a will involved in consideration of mental capacity. Case of *Swinfen v. Swinfen* considered.

1. Whilst the law has fixed the age which must be reached before a person is deemed capable of making a will, no certain period in a man's life has ever been determined at which that capability shall, in consequence of the decay of the faculties, be deemed to have ceased.

2. Old age does not of itself deprive a man of the capacity of making a testament (c); for a man may freely

(a) 2 Add. 445.  
(b) See also the observations of Dr. Lushington in *Dimes v. Dimes*, 10 Moo. P. C. 422-426.  
(c) Swinf. Pt. 2, s. 5, pl. 1; Go-

dolph. Pt. 1, c. 8, s. 4; *Bird v. Bird*, 2 Hagg. 142; *Lewis v. Pead*, 1 Ves. 19; *Kinderside v. Harrison*, 2 Philim. 461-462.

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make his testament how old soever he be : since it is not the integrity of the body, but of the mind, that is requisite in testaments. Yet, if a man in his old age becomes a very child again in his understanding, or rather in the want thereof, or by reason of extreme old age, or other infirmity, is become so forgetful that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic person (*a*).

3. Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the Court (*b*) ; and no just inference could be made upon the question of capacity from age merely, short of some extreme period (*c*).

4. The remarks of the learned Chancellor Kent, in an American case (*d*), are worthy of careful consideration :—  
“A man,” said he, “may freely make his testament how old soever he may be. It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has, in protracted life, to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated ” (*e*).

(*a*) Swinh. *ubi supra* ; Godolph. *ubi supra* ; 1 Williams Exors. 37.

(*b*) *Kindleside v. Harrison*, 2 Phil. lim. 461-462.

(*c*) See *Griffiths v. Robins*, 3 Mad. 191; *Mackenzie v. Handaside*, 2 Hagg. 211.

(*d*) *Van Alst v. Hunter*, 5 Johns. Ch. 148.

(*e*) See also the remarks of Judge Bradford in *Bleecker v. Lynch*, 1

Bradf. Sur. Rep. 458 : “The effect of age upon the vigour of the mind varies so much according to individual constitution, that it is difficult to form a sound general conclusion on the mere fact of advanced age. In an intellectual sense, there is nothing in the mind, abstractly speaking, tending to decay ; its loss of tone and power is consequent upon the ravages of time and disease upon the



It will be seen that the question of the capacity of a 70-year-old person to make a will, is involved in the question of the mental capacity necessary to execute a will, a subject which is considered in a subsequent chapter (a). In a recent case, on an issue "devisavit vel non," it appeared that at the time the will was made, the testator was in extreme old age, and in the last stage of physical infirmity, bedridden, utterly helpless, and dependent on the care of the plaintiff, sole devisee of the realty, a widow, the only legatee, and a physician, an attesting witness and an intimate friend of the devisee. The will was prepared by the devisee's own attorney, upon instructions elicited by himself from the testator by interrogation. The parties interested had, a few days before, represented the testator as "quite incapable of managing his own affairs, or taking care of his person;" and it was admitted at the trial that, two or three days before the will was made, the testator was not competent to make a will. The learned judge who tried the case (Byles)

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and especially the brain, upon which the understanding is dependent, is a constant manifestation. It is said that more than seventy-eight in a hundred die of old age; and it is nearly impossible to define the narrow limit of life, or its more frequent regular limit, independent of disease and accident. Blumenbach observes that, by an accurate examination of numerous bills of mortality, he had ascertained the remarkable fact, 'that a pretty large portion of Europeans reach their fourteenth year.' Haller gave a list of two hundred and twenty-one persons who lived from one hundred and sixty-nine years; and a list of one thousand seven hundred and twelve who attained a hundred and upwards. The condition of the mind in these cases, of course, varied. In Madden's six tables of the ages of the most distinguished modern philosophers, jurists, and authors, and in D'Israeli's 'the progress of old age in

new studies,' there are the names of many men whose genius shone in full splendour to the close of an advanced life. I do not mean to gauge all cases by such remarkable instances, but advert to them to show that each individual must be judged by himself. The power and brilliancy of the mind in old age is an exception, but so is longevity itself. It may be observed, in this connection, that the system frequently makes an effort at renovation in extreme old age, which is evinced in the cutting of teeth, the recovery of the original colour of the hair, and of perfect vision and hearing. This is said to occur more frequently in females, and indicates tone and strength in the nervous system, great vital power and recuperative energy. A fact of this kind occurred to the decedent, who, about the time the will was made, recovered her vision, was able to read without spectacles, and to thread the finest needle."

(a) See post. s. 7.

BOOK II. charged the jury, that if the testator understood the state  
 CHAP. VII. of his property and his family, and the effect of the will,  
 Sect. VI. and if he had free volition, and the will was really in  
 accordance with his intentions, it should be supported.  
 There was evidence that such was the case, and the jury  
 found a verdict supporting the will; and this verdict the  
 Court refused to disturb (a).

### SECTION VII.

#### *Of the Mental Capacity necessary to the making of a Valid Will.*

1. This subject treated of to a certain extent in former chapters.
2. A testator must have a sound and disposing mind, memory and understanding.
3. Opinion of C. B. Eyre in *Mountain v. Bennett*.
4. Opinion of the Judges in *Combe's case*.  
 n (a). Rules by which competency of mind must be judged.
5. Mere weakness of understanding does not incapacitate.
6. Swinburne's statement of the law.
7. Lord Kenyon's opinion.
8. Opinion of Judge Erskine in *Harwood v. Baker*.
9. Case of *Dunham's appeal*.
10. Opinion of Chancellor Walworth.
11. Case of *Martin v. Martin* considered—Ability to dictate a will said to be no test of testamentary capacity.
12. Same case in appeal—reasons of appeal.
13. Judgment of Chief Justice Draper.  
 (a) The will was written as the expression of testator's wishes.  
 (b) No suspicion cast on the writer.  
 (c) Did not appear whether testator had, prior to his illness, settled the disposition of his property in his own mind.  
 (d) Charge made in effect a charge of fraud.  
 (e) Statement of medical man's evidence.  
 (f) Statement of Thornton's evidence.  
 (g) Observations of M. R. in *Swinfen v. Swinfen* approved.  
 (h) Deceased declared of sound mind. Will sustained.
14. Swinburne's opinion as to wills made in *extremis*.
15. Rule of Ecclesiastical Courts as to wills absurd in their character—such wills considered *prima facie* invalid.
16. Contents of the will dangerous ground on which to base a conclusion.

(a) *Swinfen v. Swinfen*, 1 F. & F. 384. See also the observations of the Master of the Rolls in *Swinfen v. Swinfen*, 27 Beav. 148, and of Chief Justice Draper in *Martin v. Martin*, in appeal, 15 Grant, 588.

- 17. Roman law disallowed inofficious wills.
- 18. This rule has no place in English law.
- 19. Case of *Brounker v. Brounker*.

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1. The consideration of the mental capacity necessary to execute a valid will, necessarily forms the subject of several of the preceding sections; but these have been devoted to what may, in a certain sense, be considered as extreme forms of incapacity.

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2. It is laid down that a man must have a sound and disposing mind, memory, and understanding, before his testamentary capacity can be positively admitted. What is the extent of soundness which the law requires?

3. "It is not necessary," said Lord Chief Baron Eyre, in *Mountain v. Bennett (a)*, "to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question whether he was of a sound and disposing mind, memory and understanding. A man, perhaps, may not be insane, and yet not equal to the important act of disposing of his property by will."

4. And in another case (*b*), it was agreed by the judges that sane memory for the making of a will is not at all times when the party can speak "yea or no," or had life in him, nor when he can answer to anything with sense; but he ought to have judgment to discern, and to be of perfect memory. And it is said by Lord Coke, in the *Marquis of Winchester's case (c)*, that it is not sufficient that the testator be of memory when he makes his will to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason;

(a) 1 Cox 356.

(b) *Combe's case*, Moor. 759; Vin. Abr. tit. Devise A. 22; 4 Burn.

E. L. 49.

(c) 6 Co. 23 a; 4 Burn. E. L. 49.

BOOK II. and that is such a memory which the law calls sane and
 CHAP. VII. perfect memory (a).

SECT. VII. 5. On the other hand, it must be observed that mere
weakness of understanding is no objection to a man's disposing of his estate by will; for Courts cannot measure the size of people's understandings and capacities; nor examine into the wisdom or prudence of men in disposing of their estates (b).

6. "If a man," says Swinburne (c), "be of a mean understanding (neither of the wise sort nor the foolish), but indifferent, as it were, betwixt a wise man and a fool; yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *gros-sum caput*—a dull pate, or a dunce—such a one is not prohibited from making his testament" (d).

7. Lord Kenyon, in *Greenwood v. Greenwood* (e), thus defines the degree of strength of mind and memory which a testator must possess: "He must have that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wishes to dispose of it."

8. And in *Harwood v. Baker* (f), Erskine, J., said: "He must have capacity to comprehend the extent of his property, and the nature of the claims of others whom,

(a) See further, *Herbert v. Lowe*, 1 Ch. Rep. 24; Dyer, 72 a, in marg.; *Right v. Price*, 1 Dougl. 241; *Ball v. Mannin*, 3 Bligh N. S. 1; S. C., 1 Dow & Clark, 380; *M'Diarmid v. M'Diarmid*, 3 Bligh N. S. 374. See also the judgment of Sir J. Nicholl in *Marsh v. Tyrrell*, 2 Hagg. 122, as to the rules by which the competency of the mind must be judged; and see further the judgment of the same learned judge in *Ingram v. Wyatt*, 1 Hagg. 401, where some valuable remarks on the subject of

imbecility of mind will be found. For an instance where weakness of mind and forgetfulness will not constitute incapacity, see *Constable v. Tufnell*, 4 Hagg. 465; affirmed on appeal 3 Knapp. 122; 1 Williams Exors. 38 and notes.

(b) 1 Williams Exors. 39 and notes; *Osmond v. Fiteroy*, 3 P. W. 129.

(c) Pt. 2, s. 4, pl. 3.

(d) See also *Harrod v. Harrod*, 1 Kay & J. 4.

(e) 3 Curt. App. 2, 30.

(f) 3 Moo. P. C. 282.

his will, he is excluding from all participation in that property" (a).

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9. In a late American case (b) it was held that although the testator was subject to insane delusions, yet if he had mind enough to know and appreciate his relation to the natural objects of his bounty, and the character and effect of the dispositions of his will, he had sufficient capacity to enable him to make a valid will.

10. And Chancellor Walworth, in *Clarke v. Fisher* (c), said that the testator, to be capable of making a testament, must be able to do it with sense and judgment in reference to the situation and amount of his property, and the relative claims of different persons who are, or might be, the objects of his bounty; and he concludes his judgment thus: "We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should or might have been, the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the *ases*, have sufficient *active memory* to collect in his mind *without prompting* the particulars or elements of the business to be transacted, and *to hold them in his mind* a sufficient length of time to perceive at least their obvious relations to each other, and be able to form *some rational judgment* in relation to them."

11. The question now under consideration came before our Court of Chancery in the recent case of *Martin v. Martin* (d). In that case a bill was filed by the elder children of a testator to set aside a will made in favour of the youngest child. Fraud was not alleged, and the

(a) See the remarks of Cresswell, J. in *Sefton v. Hopwood*, 1 F. & F. 573; and of Erie, J., in *Lovett v. Lovett*, 1 F. & F. 581.

(b) *Dunham's* appeal, 27 Conn. 192.

(c) 1 Paige, 171.

(d) 12 Grant, 500.

BOOK II. case turned solely upon the question whether or not the
 CHAP. VII. testator was of sound and disposing mind and memory
 Sect VII. when the will was made. Mowat, V.-C., in giving judgment in the Court below, sustaining the will, said: "Now, by our law mere weakness of understanding is no objection to a man's disposing of his estate by will (a); so he may have testamentary capacity though his mental faculties have been impaired by disease, though he is 'of feeble and even of a decaying mind,' and though his state of mind is such 'that fair, honest, and reasonable persons might well hesitate about his competency' (b). The case to be made out 'is not that the testator was not enfeebled in mind as well as in body; but the question is whether it was to such an extent as to make him incompetent to make a will' (c). An impaired intellect short of incompetency may make a man less capable of considering the proper disposition to be made of his property, and less capable of making a wise and just will; but proof of this merely diminished capacity is not sufficient to affect the validity of his act" (d).

12. The same case was brought before the Court of Appeals (e), and the following grounds were alleged in support of the appeal:—That the evidence shows that the deceased was not capable of understanding, and that he did not understand, the contents of the alleged testamentary paper; that even if he was capable of understanding portions of the will, yet he was wholly incompetent to understand the same as a whole, and he did not fully comprehend its meaning, and the same is not in fact the

(a) 1 Williams Exors. 39; *Barry v. Butlin*, 2 Moo. P. C. 480.

(b) *Swinfen v. Swinfen*, 27 Beav. 159.

(c) *Ib.* 160. See also S. C., 1 F. & F., 593; *Constable v. Tuffnel*, 4 Hagg. 465 affirmed on appeal, 3 Knapp,

122; *Russ v. Chester*, 1 Hagg. 22.

(d) "The ability to dictate a will is no test of testamentary capacity." In the goods of *Field*, 3 Curt. 753; *Wilson v. Beddard*, 12 Sim. 28.

(e) 15 Grant, 586.

will of the deceased ; that important and material additions and variations (as appears in the evidence) were intended by the deceased to be contained in such testamentary paper, which would have had the effect of materially changing the contents of, and results from, the said testamentary paper, and therefore, even if the deceased was capable of understanding the same, paragraph by paragraph, yet, not being able to remember or comprehend the same as a whole, he was unable at the conclusion to say whether or not those material additions and variations were embraced in the written testamentary paper, but in fact he thought that they were embraced therein, and he would not have signed the same if he had been told or had known that they were not embraced in the said testamentary paper ; that the deceased intended to give instructions for those variations and additions, and he did, in fact, give some of such instructions, but the instructions were given in such a way that they could not be wholly understood, and they were not inserted in the will ; and that the said testamentary paper does not contain the true intentions of the testator, even as to those matters which are contained therein.

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13. The judgment in the Court below was affirmed. The learned President of the Court of Appeals said : "The petitioners rest their case upon this charge, that the deceased was, at the time of executing the will of which probate has been granted, and from thence until the time of his death, wholly incapable of understanding the contents thereof, or of dictating the same—did not dictate it—did not understand it, and it was not, therefore, properly his last will and testament.

(a) " The evidence very clearly shews that the matters contained in the will were written by Mr. Thornton, as being the expression of the wishes and intentions of the

BOOK II. testator for the disposition of his property—not all that
 CHAP. VII. Mr. Thornton believed was in the mind of the testator,
 Sect. VII. but ‘to a considerable extent’ what was so. This expression was beyond doubt obtained with difficulty—under the impediment presented by weakened faculties of mind, as well as weakened physical powers, caused, as to both, by a disease of some continuance, and by the near approach of death. The expression was far from continuous; not one act, the result of unbroken ‘continuity and concentration of thought’ (as the medical attendant expressed it) first deliberately conceived, and then deliberately dictated; but uttered at intervals, when the mind, which was wearied and exhausted by the previous effort, had been recalled to the point at which he had broken off; and thus, by slow degrees, the writer was enabled to gather and to put into writing the disposition of his property by the dying man.

(b) “No suspicion is cast, or attempted to be cast, as I have already incidentally remarked, on the character or conduct of Mr. Thornton in the transaction. It does not appear that he had any preconceived notions of what the testator desired or intended. He seems to have anxiously endeavoured to understand his wishes, and to have done his best to express the intention of the testator as he gathered and understood it.

(c) “The evidence does not show positively whether the deceased had or had not, prior to his illness, settled in his own mind in what manner he would dispose of his property, though the petition asserts that he had frequently, before his illness, expressed a different intention from that which the will contains; but there is no proof of this. Mr. Thornton had been told by his wife that the arrangement had been settled; but this is all, and is not evidence

f the fact, nor, if it were, that those arrangements were allowed in the will.

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(d) "Indirectly, the charge made, that the testator did not dictate and was incapable of understanding or of dictating the contents of the will, is a charge of fraudulent advantage taken of his condition to impose upon him by obtaining his signature to a disposal of his property, which the alleged incapacity rendered it beyond his power, whatever his intention at some other time may have been, to make at that time.

(e) "There are two witnesses only whose testimony need be considered, for the purpose of determining whether this charge is sustained—Dr. McGill and Mr. Thornton. The first states a belief that, during the greater part of his illness, the deceased was incapable of attending to any business that required continuity or concentration of thought; that if the arrangements had all been made before he was taken ill, he was (in the witness's opinion) *incapable of assenting to the will afterwards*; that, if the testator had not arranged previously, he could not have stated the terms of the will on Sunday morning, but he could have understood what was written down; and his previous arrangements were put in writing clearly. He could have understood and given his assent to them, all this is no more than the opinion of the medical attendant,—of great value to aid in coming to a conclusion, but in no respect conclusive; except that *sub modo*—hypothetically put—it admits the existence of a disposing mind and memory.

(f) "The second establishes, first, what the other evidence confirms, a failing mind in the dying man; an incapacity to fix his attention except at intervals—a difficulty of communicating his wishes; but it appears to me also to afford proof that the testator had a purpose in

BOOK II. view, and that, to accomplish one object that was in his
 CHAP. VII. mind, he thought (rightly or wrongly is unimportant)
 Sect. VII. that an entail was necessary—an entail being mentioned
 as a means of effecting such object. And thus, inde-
 pendently of what Mrs. Martin stated, I find proof that
 he had meditated on the disposition of his property, and
 had in his mind some fixed conclusion with regard to it.

(g) "I am much impressed with the observations of the
 Master of the Rolls in *Swinfen v. Swinfen*. It would
 certainly be a new fact, if it could be established, that in
 advanced age, or in any other stage of disease, the mind
 of the sufferer is incompetent to do a thing one day, be-
 cause it failed to accomplish it the preceding day. * * *
 I know not that for the mere testing the power of a de-
 caying intellect to do a particular act, a medical man is
 more competent than another to form a correct opinion.

(h) "And on the whole I prefer in this case to rest my
 conclusion on the evidence of Mr. Thornton when he
 says: 'The deceased was of sound mind, memory, and
 understanding, so far as a single question was concerned—
 He gave me a good many of the items himself, without
 any suggestion. At other times Mrs. Martin suggested
 the subject, and he endeavoured to say what he wished
 done. For a single sentence he would express himself
 distinctly: he was *compos mentis*. I have no doubt he
 had at the time an intention of making a will. He some-
 times was in doubt what to say, and did not define it.
 I did not write down what I did not understand. * * *
 It was painful for me to draw the will, because of my
 doubts of his meaning. He was incapable of expressing
 two sentences consecutively; but being allowed to re-
 st awhile, he would then commence afresh. I am not sat-

at I gathered his meaning on all the points of the (a).

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The nature of the foregoing case suggests a reference to the quaint remarks of Swinburne (b): "When it is at the point of death (or in a state of great imbecility), and hardly able to speak so as to be understood, doth not, of his own accord, make or declare testament; but at the interrogation of some other, asking of him whether he make this or that man his heir, or, and whether he give such a thing to such a person, answereth 'Yea,' or 'I do so,' in which case it is a question of some difficulty whether the testament be valid or not. For if he which doth ask the question of the testator be a suspected person, or be importunate to the testator to speak, or make request to his own prejudice; as if he say, 'Do you make me your executor,' or 'Do you give this or that?' and, therefore, the answer 'Yea,' it is to be presumed that the testator answered 'Yea' rather to deliver himself of the importunity of the demandant, than upon devotion or intention to make his will." The writer adds, that persons in extremity, finding it painful to be disturbed, will usually answer to be quiet; and that some crafty persons take advantage of this painful extremity to obtain what is in their own favour; and that if such questions are asked of suspected persons, the answer is not to be received as a free expression of the will of the testator. Swinburne illustrates his text with the case of a monk who, being a gentleman, then *in extremis*, to make his will.

See also the observations of Lord C., in *Menzies v. Grant*, 574; *Brown v. U. C. Q. B.* 35. A will is admitted to probate in such case, unless the strength of proof offered is such as

to satisfy the Court, without reasonable doubt, that the testator was, at the time of execution, of sound mind, memory, and understanding. *Keays v. M'Donnell*, 6 Ir. Eq. Rep., 611, P.

(b) Swinburne Pt. 2, s. 25, pl. 5.

BOOK II. "The monk asked the gentleman if he would give such a
 CHAP. VII. manor and lordship to his monastery. The gentleman
 Sect. VII. answered 'Yea.' Then, if he would give such and such
 estates to such and such pious uses. The gentleman
 answered 'Yea' to them all. The heir-at-law, observing
 the covetousness of the monk, and that all the estate
 would be given from him, asked the testator if the 'monk
 was not a very knave,' who answered 'Yea.' And upon
 the trial, for the reasons above said, it was adjudged
 no will." Swinburne adds, however, that if the person
 making such inquiries be sent for, as the friend of the tes-
 tator, for the purpose of making the will, and have no
 interest in the matter, "the testament is good, albeit it
 were in prejudice of another testament made before" (a).

15. It was a standing rule of the Ecclesiastical Courts
 to treat all wills as *prima facie* invalid which were ab-
 surd in themselves, or as it was expressed, "if there be
 one word sounding to folly" (b). But an examination of
 the cases referred to in the preceding sections, particularly
 those on the subject of monomania, will show that this
 rule cannot be maintained in the absolute form in which
 it was formerly laid down (c).

16. In *Martin v. Martin* (d), Mowat, V.-C., adopted and
 acted upon the observations of the Master of the Rolls in
Swinfen v. Swinfen (e). In that case it was said that "the
 contents of a will are a very dangerous ground to rest
 upon, even in connection with other testimony; but in
 cases where there is no unsoundness of mind (in the pro-
 per sense of that term), but rather an absence of intellect,
 and the only question is whether the deceased person

(a) See 1 Redf. Wills, 130-131,
 131-132.

(b) Swinb. Pt. 2, s. 3, pl. 15;
 1 Williams Exors., 35; per Lord
 Brougham in *Waring v. Waring*,

6 Moo. P. C. 349.

(c) See *Arbery v. Ashe*, 1 Haggs.
 214.

(d) 12 Grant, 500.

(e) 27 Beav. 155.

knew what he was doing, the contents of the will can rarely be brought to throw light on that subject." BOOK II.
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17. It was a rule of the Roman law that, if the testator by his will omitted to provide for his children, without assigning a good and true reason for so doing, the will might be set aside as being "*inofficious*;" but if any provision was made for the children, however small it might be, the will was not open to the objection of being "*inofficious*" (a). SECT. VII.

18. But this rule has no place in our law; for, if it be shown that the testator knew and approved of the contents of the instrument, the mere fact that its provisions are not consistent with the generally received opinions as to natural duty will not invalidate the will (b). The Court would probably, however, in such a case, require strict proof of knowledge and approval on the part of the testator (c).

19. In a case where the deceased made a will containing a proper disposition of his property, and three days afterwards executed a codicil, the effect of which was to leave the eldest son destitute, the codicil was rejected and the will held valid on the ground that the deceased was not of a sound and disposing mind when the codicil was executed (d).

(a) 2 Black. Comm. 503; *Wrench v. Murray*, 3 Curt. 623. *Montefiore v. Montefiore*, 2 Add. 361, 362; *Dew v. Clark*, 3 Add. 207, 208.
(b) 1 Williams Exors. 36. (d) *Brounker v. Brounker*, 2 Philim. 57.
(c) *Bregden v. Brown*, 2 Add. 49;

CHAPTER VIII.

OF WANT OF LIBERTY AND FREE WILL.

1. Prisoners, captives, &c., considered intestable in former times.
2. The rule is now different, the question in each case being whether or not the testator had *liberum animus*.
3. A will procured by force or fear may be set aside.
4. Nature and extent of the fear which will vitiate a will considered.

BOOK II. 1. In the early treatises on Wills may be found a long
CHAP. VIII. list of persons disqualified from making wills :—Prisoners, captives, slaves, villeins and the like, were formerly considered intestable (a.)

2. But by our law such persons are not considered intestable. The question in each case simply is, whether the testator had *liberum animus testandi*, or whether the testament is the result of constraint (b).

3. A will procured by the use of force may be set aside, though duly executed by the testator (c); and if the testator is constrained by fear to make a will, the will cannot stand (d).

4. But it is not every fear, or a vain fear, that will have the effect of annulling the will; but a just fear; that is, such as that, indeed, without it the testator had not made his testament at all, at least not in that manner (e). A vain fear is not enough to make a testament void; but it must be such a fear as the law intends, when it expresses it by a fear that may *cadere in constantem virum*—

(a) Swinb. Pt. 2, s. 8; Godolph. Pt. 1, c. 9.

(b) 2 Black. Comm. 497.

(c) *Mountain v. Bennet*, 1 Cox, 355, by Eyre, C. B.; *Boyse v. Ross-*

borough, 3 Jur. N.S. 373; 6 H.L.—C. 2, per Lord Cranworth.

(d) Godolph. Pt. 3, c. 25, s. 8 Swinb. Pt. 7, s. 2, pl. 1.

(e) Godolph. Pt. 3, c. 25, s. 8.

(a), as the fear of death, or of bodily hurt, or of imprisonment, or of loss of all or most part of one's goods or the like (b), whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the person threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity and the like (c).

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(a) Godolph. Pt. 3, c. 25, s. 8; (c) Swinb. Pt. 7, s. 2, pl. 7. See
Swinb. Pt. 7, s. 2, pl. 7. *Nelson v. Oldfield*, 2 Vern. 76.
(b) Swinb. Pt. 7, s. 2, pl. 7.

CHAPTER IX.

OF FRAUD OR UNDUE INFLUENCE USED IN PROCURING A WILL TO BE MADE.

SECTION I.

Of Fraud.

1. All transactions tainted by fraud are voidable.
2. Degree of fraud necessary to vitiate a will considered.
3. Opinion of Lord Cranworth in *Boyse v. Rossborough*.
4. Modes of fraud exceedingly various—Case of *Wilkinson v. Jonghin*.
5. Strong and clear evidence of fraud required.
6. Fraud, to vitiate a will, must be contemporaneous with the making of the will.
7. Clause introduced into a will by fraud does not become part of the will.

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CHAP. IX.
Sect. I.

1. It is a well-understood principle of law, that a transaction procured by fraud cannot stand. Fraud is no less detestable than open force: wherefore, when the testator is circumvented by fraud, the testament is of no more force than if he were constrained by fear (*a*).

2. With regard to what deceit shall annul a testament on the ground of fraud, as in the case of a will made under fear, it is left to the discretion of the judge, comparing the deceit with the capacity or understanding of the person deceived, to discern whether it be such as may overthrow the testament or not (*b*).

3. The light in which the Court regards wills procured by fraud or improper influence is clearly stated by Lord

(*a*) Swinb. Pt. 7, s. 3, pl. 1; per Lord Hardwicke in *Lord Donegal's case*, 2 Ves. Senr. 408.

(*b*) 1 Williams Exors. 43; Swinb. Pt. 7, s. 3, pl. 3. See also cases

cited by Lord Lyndhurst in *Allen v. McPherson*, (1 H. L. C. 207, 208) of wills obtained by false representations.

Cranworth in the case of *Boyse v. Rossborough* (a). Referring to the will which was the subject of the appeal, he says (b), "But though a good will so far as relates to its execution and attestation, it yet might not be an instrument having any legal validity; for if the person by whom it was made was not at the time of making it of sufficient mental capacity to enable him to dispose of his property, or if, having sufficient disposing mind, he executed it under coercion, or under the influence of fear, or in consequence of impressions created in his mind by fraudulent misrepresentations—in none of these cases can the instrument be properly described as being his will. In the first case, the maker is, by the hypothesis, incapable of having a will. In the other cases supposed, though there is a power of willing, yet the instrument will not be, in contemplation of law, a true expression of that will. I say in contemplation of law; for, perhaps, speaking with strict metaphysical accuracy, the instrument, in these latter cases, does truly express the testator's will, and the more correct mode of expression would be, that the law will not give effect to the will of a testator when that will has been thus unduly brought about. If I meet a man in the street, and he puts a pistol to my breast, and threatens to shoot me if I do not give him my purse, and to save my life I yield to his demand; or if a neighbour, meaning to steal my horse, asks for the loan of it, stating that he wants it in order to go to market, and trusting to this representation I deliver it to him, and then he rides off and sells it—in both these cases, it was my will to hand over the purse and the horse, but the law deals with the case as if they had been obtained against my will, my will having been the result in one

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(a) 6 H. L. C. 2; 3 Jur. N. S. (b) At p. 376 of Jur.

BOOK II. case of fear, and in the other of fraud. The same principle must guide us in determining whether an instrument, duly executed in point of form, so far as legal solemnities are concerned, is or is not a valid will. The inquiries must be—First, was the alleged testator at the time of its execution a person of sound mind? And if he was, then, secondly, was the instrument in question the expression of his genuine will, or was it the expression of a will created in his mind by coercion or fraud (a)?”

4. The modes of fraud are so various that a full consideration of them would be impossible. The recent case of *Wilkinson v. Jonghin* (b) is an illustration of the doctrine that fraud invalidates all transactions with which it is even remotely connected. In that case, a man having married a woman who represented herself to be a widow, a representation which proved to be untrue, as she had a husband living, made a will containing bequests in her favour. On bill filed, the Court set aside the bequests, as having been procured by the previous fraudulent misrepresentation.

5. The Courts usually require strong evidence to show that a duly executed will is not the act of the testator, and that he was not aware of its provisions (c).

6. Fraud, to vitiate a will, must be contemporaneous with the making of the will, and must be discovered and be part of the *res gestæ* (d). The fact of a testator retaining his mental capacity, and for a considerable time surviving the date of, without altering or throwing doubts upon, his will, is an important circumstance in favour of its validity (e).

(a) See also *Small v. Allen*, 8 T. R. 497; *Powell v. Mouchett*, 6 Mad. 216.

(b) L. R. 2 Eq. 319.

(c) *Wrench v. Murray*, 3 Curt. 623; *Panton v. Williams*, 2 Curt. 530. See

also *Scouler v. Plowright*, 10 Moo. P. C. 440, in which the will was set aside.

(d) *Kelly v. Thewles*, 2 Ir. Rep. 510.

(e) *Kelly v. Thewles*, sup.

7. A clause introduced into a will by fraud, and without the testator's knowledge, does not become part of the will (k).

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SECTION II.

Of Undue Influence.

- 1 Will procured by undue influence cannot stand.
- 2 Influence merely may be legitimately used to induce a testator to make certain provisions.
3. The relative positions of the parties must be regarded in determining what is undue influence. The relations of husband and wife considered.
4. Case of *Hall v. Hall*. Persuasive appeals to the affections permitted ; pressure of whatever character interdicted.
5. Leading case of *Boyse v. Rossborough*—Lord Cranworth's Judgment.
 - (a) Difficulty of defining undue influence.
 - (b) Difficulty of this question increased where relation that of husband and wife.
 - (c) Influence, to be undue, must be an influence exercised by coercion or fraud.
 - (d) Consideration of coercion.
 - (e) Consideration of fraud.
 - (f) Difficulty of stating what acts will constitute undue influence.
 - (g) Burden of proving undue influence lies on those who allege it.
 - (h) Undue influence cannot be presumed.
 - (i) Consideration of course which should have been taken by testator.
 - (k) That the course which he in fact took.
 - (l) To set aside the will of a person of sound mind, it is not sufficient to show that the circumstances of its execution are consistent with hypothesis of undue influence. The undue influence must be in relation to the will itself.
6. Cases of undue influence numerous in our own Courts—Case of *Donaldson v. Donaldson*.
7. Case of *Waterhouse v. Lee*.
8. A will may be void as to one person and good as to another.
9. The fact that a will is drawn by the person most benefited by it, does not render it invalid.
10. The *Parish Will* case.
11. Case of *Barry v. Butlin*—Judgment of the Privy Council in that case.
12. By the rule of the civil law, a will written by a person in his own favour was rendered void.

(k) *Allen v. McPherson*, 1 H. L. C. 191.

13. If person who drew the will and was benefited by it, stands in a fiduciary relation to the testator, the proof of the latter's knowledge and approval of the contents must be clear.
14. A will in favour of the solicitor who drew it may be good.
15. So may a will in favour of a medical attendant.
16. Distinction between gifts *inter vivos* and by will as connected with the subject of undue influence—Case of *Parfitt v. Lawless* stated.
 - (a) Statement of the rule as to gifts *inter vivos*.
 - (b) The law regarding wills very different.
 - (c) Influence necessary to set aside a will considered.
 - (d) Conclusion that the rule as to wills not the same as to gifts *inter vivos*.
- n. (d) Court of Probate alone can in England try validity of will on ground of fraud or undue influence; in this Province the Court of Chancery has jurisdiction.

BOOK II. 1. Undue influence is a species of fraud, and a will
 CHAP. IX. procured by such means will not be allowed to stand.

SECT. II. 2. It is well established that influence merely may be legitimately exercised over the testator; and it is only where such influence becomes undue or improper, that the law avoids a will procured by its means. A person may solicit another to make a will in his favour, and he may use all right and lawful means to forward that end; but the law will not permit him to attain his object by threats, or by influencing the mind of the testator by working on his fears, and those other passions to which mankind are often slaves (a).

3. A great many considerations enter into the question what, in any particular case, may constitute undue influence. The relative positions of the parties must be looked at. Thus, in a late English case, in which a will made in favour of the testator's wife was sought to be set aside, Dr. Lushington remarks: "What law can decide what is the degree of influence which a wife can exercise over a husband sufficient to invalidate acts done under it?"

(a) *Hall v. Hall*, L.R. 1 Prob. 482; 37 L.J.P. 40; 17 L.T.N.S. 152.

What may be the motives upon the mind of the testator? Put the case in the strongest point of view—fear of displeasing—fear of future solicitation—love of peace—or, it may be, deference to superior judgment—or affection and regard—who is to dive into these motives? What evidence can any tribunal have? Coercion may, indeed, be capable of proof, and in such case no act would be valid.” And it appearing that the testator, though enfeebled in mind, had the power of resistance, and that there was not the slightest evidence of importunity, the Court pronounced for the will (a).

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4. The general law upon the subject of undue influence in the procuring of wills is stated with great clearness in the recent case of *Hall v. Hall* (b). In this case the will was attacked on the ground that it had been procured by the violence and threats of the testator's wife. In leaving the case to the jury, the learned judge remarked: “To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion—appeals to the affections, or ties of kindred—to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate, and may be fairly pressed on a testator (c). On the other hand, pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition, without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity, or threats such as the testator has not the courage to resist—moral command asserted and yielded to for the sake of peace and quiet, or of escaping

(a) *Stutz v. Schaeffle*, 16 Jur. 909.
See also *Williams v. Goude*, 1 Hag. 577; *Armstrong v. Huddleston*, 1 Moo. P. C. 474.

(b) L. R. 1 Prob. 482; 37 L. J. P. 40; 17 L. T. N. S. 152.

(c) See the remarks of Cresswell, J., in *Sefton v. Hopwood*, 1 F. & F. 578.

BOOK II. from distress of mind or social discomfort—these, if
 CHAP. IX. carried to a degree in which the free play of the testator's
 SECT. II. judgment, discretion or wish is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

5. In another case (*a*) which came before the House of Lords, and in which the question at issue was whether or not a will had been procured by fraud and undue influence exercised by the testator's wife, Lord Cranworth distinguishes between undue influence in the ordinary and popular sense of the term, and that undue influence which is held by the Courts to invalidate a benefit procured by its means.

6. After referring to the mental capacity of Mr. Colcleugh, the testator, the learned judge says: "I shall therefore assume that Mr. Colcleugh had sufficient mind to enable him to make a will, if left to exercise his judgment freely; and I will consider the other, which is the real point of the case, namely, whether the verdict is satisfactory, supposing it to have proceeded on the ground, that though Mr. Colcleugh had a disposing mind, yet the document in question cannot be considered to be his will, by reason of its having been obtained from him by the undue influence of his wife.

(*a*) "The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by fol-

(*a*) *Boyse v. Rosborough*, 6 H. L. C. 2; 3 Jur. N. S. 173.

owing the example of a friend of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the friend is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the friend who has thus led him astray, were to make a will and leave to him everything he possessed, such a will could not be impeached on the ground of undue influence, nor would the case be altered merely because the friend had urged, or even importuned the young man so to dispose of his property—provided only that in making such a will the young man were really carrying into effect his own intention, formed without either coercion or fraud.

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(b) "I must further remark, that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion, are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish.

(c) "In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that *influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud.*

(d) "In the interpretation, indeed, of these words, some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been

BOOK II. used or even threatened. The conduct of persons in vigorous health towards one feeble in body, even though not CHAP. IX. unsound in mind, may be such as to excite terror, and Sect. II. make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion.

(e) "So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions, which she knows he had thus formed to their disadvantage, may never be removed, such contrivance may perhaps be equivalent to positive fraud, and may render any will invalid executed under false impressions thus kept alive.

(f) "It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads, *coercion* or *fraud*.

(g) "One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it.

(h) " *Undue influence cannot be presumed* ; and looking to the evidence in the present case, I am unable to discover evidence warranting the conclusion at which the jury arrived, supposing them to have proceeded on the ground of undue influence. That Mr. Colcleugh might, without any undue influence operating on his mind, de-

ire to make a will giving everything to his wife, is a proposition which cannot be controverted. She had been the partner of his life for twenty-four years. He had no children. His nearest relative was a first cousin of his father, with whom, from whatever cause, he had never had more than slight and casual intercourse. His heir presumptive was a second cousin, of whose very existence he does not appear to have been aware, being the daughter of another and elder first cousin of his father, who had died many years previously. That he should in these circumstances wish to give everything to his wife could surely afford no ground for surprise; and one mode, therefore, of looking at this subject is to consider whether, supposing him, without the exercise of any sinister influence, to have entertained such a wish, his conduct would have been that which, according to the evidence, he in fact pursued.

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(i) "Supposing, then, that Mr. Colcleugh, on the 6th August, 1842, being, as I assume he was, sound in mind, though very infirm in body, entertained the wish to give everything to his wife, what is the course which, as a reasonable man, he would be likely to pursue? He would surely send for his solicitor, and, in the absence of his wife, give him necessary instructions, and when the will was prepared he would execute it in the presence only of his solicitor and some other disinterested witness, for which purpose no one would be more fit than his medical attendant.

(k) "Now, this is precisely the course which he did take; and the burthen of proof at the trial was, therefore, on the respondent to show that though what was done bore the semblance of being the voluntary act of Mr. Colcleugh, yet it was an act which he was induced to perform under the influence of terror or fraud. Now, my Lords, I look

BOOK II. in vain for any such evidence. The most I can find, if
 CHAP. IX. indeed that can be found, is evidence to show that the act
 SECT. II. done was consistent with the hypothesis of undue influence ; that the instrument, though apparently the expression of his genuine will, might in truth have been executed only in compliance with the threats or commands of his wife ; or that he had been led to execute it by unfounded prejudices artfully instilled into or cherished in his mind by his wife against those who would otherwise have been the probable objects of his bounty.

(b) " But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence ; it must be shown that they are inconsistent with a contrary hypothesis. Can it be truly said that there is any such inconsistency here ? The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But this principle must not be carried too far. Where a jury sees, that at and near the time when the will sought to be impeached was executed, the alleged testator was in other important transactions so under the influence of the person benefited by the will, that, as to them, he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that, in regard to that also, the same undue influence was exercised."

6. The cases upon the subject of undue influence in our own Courts are very numerous (a). They relate chiefly,

(a) *McGonigal v. Storey*, 14 Grant, 596 ; *Corrigan v. Corrigan*, 15 Grant, 94 ; *Mason v. Sney*, 12 Grant, 143 ; 341 ; *Armstrong v. Armstrong*, 14 Grant, 528 ; *Wyott v. Hartman*, 14 Grant, 219 ; *Elgie v. Campbell*, 12 Grant, 132 ; *Denison v. Denison*, 13 Grant, 114,

however, to deeds and other instruments taking effect *inter vivos* (a). In *Donaldson v. Donaldson* (b), the Court had occasion to consider the effect of undue influence in connection with the will of the plaintiff in the suit. The defendant, who was the plaintiff's favourite son, had procured his father, who was seventy-two years of age, to leave the terms of his will to arbitration. In pursuance of this arrangement, arbitrators were appointed, who awarded that the father should execute a will in the son's favour. The will was executed accordingly. Being executed in pursuance of an agreement, it was not revocable, and the father, having repented of what he had done, filed the bill to set aside the will, alleging undue influence on the part of his son. The learned judge who tried the case, (Mowat, V.-C.) being satisfied that the plaintiff was weak in mind and of deficient memory, and had not had the benefit of independent professional advice, and that the defendant had procured the reference to arbitration by means of importunity, reproaches and threats, set aside the will.

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7. In the case of *Waterhouse v. Lee* (c), the Court acted upon the principles laid down in the English cases cited above. In his judgment the learned Vice-Chancellor (Spragge) remarks (d), "We have nothing to show that the document executed expressed his (the testator's) will; a good deal to show the contrary—a good deal to show that it expressed the will of his wife, and that she possessed and exercised a control which impelled him to give expression to her will in the paper to which he had put his name. Under the evidence, therefore, I feel obliged to

(a) See the case of *Parfitt v. Lawson*, L. R. 2 Prob. 462; 41 L. J. P. 68; 27 L. T. N. S. 215, as to how far the principles which are applied to transactions *inter vivos* are applicable to wills.

(b) 12 Grant, 431.
(c) 10 Grant, 176.
(d) At p. 192.

BOOK II. pronounce against the will." Persuasion, which would be
 CHAP. IX. powerless when the testator is in sound health, may
 SECT. II. amount to an improper influence if used when he is incapable from disease of resisting it (a).

8. Although, where an undue influence is exercised over the mind of a testator in making his will, the provisions of the will in favour of the person exercising that influence are void, yet the will may be good as far as respects other parties; so that a will may be valid as to some parts, and invalid as to others; may be good as to one party, and bad as to another (b).

9. The mere fact that a will is drawn by the person most benefited by its provisions, does not render the will invalid. If the person benefited propounds the will, he must bring forward such evidence as will entirely satisfy the mind of the Court that the testator knew and approved of the contents of the instrument (c).

10. In the celebrated *Parish Will Case* (d), the law was laid down by the Court as follows:—"In regard to the effect of a will being written or procured by one interested in its provisions, the maxim, *qui se scripsit hæredem*, has imposed, by law, an additional burden on those claiming to establish a will under circumstances which call for the application of that rule; and the Court, in such a case, justly requires proof of a more clear and satisfactory character."

11. And in *Barry v. Butlin* (e), Baron Parke, delivering the judgment of the Judicial Committee of the Privy Council, thus stated the law: "The rules of law, accord-

(a) Per Sir Wm. Wynne in *Dickenson v. Mors*, Prerog. T. 1790; *Higginson v. Colcot*, 1 Cas. temp. Lee, 138.

(b) Lord Trimlestown v. D'Alton, 1 Dow. N. S. 85; *Wood v. Wood*, 1 Phillim. 357; per Mowat, V.-C., in *Martin v. Martin*, 12 Grant, 514.

(c) *Mitchell v. Thomas*, 12 Jur. 967; 6 Moo. P. C. 137; per Draper, C. J. in *Martin v. Martin*, 15 Grant, at p. 588.

(d) *Delafeld v. Parish*, 25 N. Y. R. 9.

(e) 1 Curt. 637; S. C. 2 Moo. P. C. 480.

ing to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal, and have been acquiesced in on both sides. These rules are two : the first is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator ; the second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased. These principles, to the extent that I have stated, are well established. The former is undisputed ; the latter is laid down by Sir John Nicholl in substance in *Paske v. Ollat* ; *Ingram v. Wyatt* ; and *Billinghurst v. Vickers*, and is stated by that very learned and experienced judge to have been handed down to him by his predecessors, and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker v. Batt* (a). " Their Lordships are fully sensible of the wisdom of this rule, and of the importance of its practical application on all occasions. At the same time, they think it fit to observe, especially as there has been some discussion upon this point towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal, and capable of leading into error in the investigation and decision of questions of this na-

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(a) 2 Moo. P. C. 317. See also *Hitchings v. Wood*, Ibid. 355, 436.

BOOK II. ture. It is said that where the party benefited prepares
CHAP. IX. the will, the presumption and *onus probandi* is against
Sect. II. the instrument, and the proof must go not merely to the
act of signing, but to the knowledge of the contents of the
paper ; and that where the capacity is doubtful, there must
be proof of instructions or reading over. If by these ex-
pressions the learned judge meant merely to say that
there are cases of wills prepared by a legatee so pregnant
with suspicion, that they ought to be pronounced against
in the absence of evidence in support of them extending
to clear proof of actual knowledge of the contents by the
supposed testator, and that the instructions proceeding
from him or the reading over the instrument by or to
him, are the most satisfactory evidence of such knowledge,
we fully concur in the proposition so understood. In all
probability, the learned judge intended no more than this.
But if the words used are to be construed strictly ; if it is
intended to be stated, as a rule of law, that in every case
in which the party preparing the will derives a benefit
under it, the *onus probandi* is shifted, and that not only
a certain measure, but a particular species of proof is
thereupon required from the party propounding the will,
we feel bound to say that we conceive the doctrine to be
incorrect. The strict meaning of the term *onus probandi*
is this, that if no evidence is given by the party on whom
the burthen is cast, the issue must be found against him.
In all cases this *onus* is imposed on the party propounding
a will ; it is, in general, discharged by proof of capacity,
and the fact of execution, from which the knowledge of
and assent to the contents of the instrument are presumed ;
and it cannot be that the simple fact of the party who
prepared the will being himself a legatee is, in every case
and under all circumstances, to create a contrary presump-

tion, and to call upon the Court to pronounce against the will, unless additional evidence is produced to prove knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition :—A man of acknowledged competence and habits of business, worth 100,000*l.*, leaves the bulk of that property to his family, and a legacy of 10*l.* or 50*l.* to his confidential attorney, who prepared his will ; would this fact throw the burden of proof of actual cognizance by the testator of the contents of the will on the party propounding it ; so that, if such proof were not supplied, the will would be pronounced against ? The answer is obvious—it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case ; in some of no weight at all, as in the case suggested ; varying according to the circumstances—for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies ; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the instrument ; they form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence ; in some

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BOOK II. cases it might be impossible to establish a will without it ;
 CHAP. IX. but it has no right in every case to require it. I have said
 SECT. II. thus much upon the rules of law applicable to this case,
 with the concurrence of all their Lordships who heard the
 argument, not particularly with a view to the decision of
 this case, but in order to prevent any misconception upon
 a subject of so great practical importance. At the same
 time their Lordships wish it to be distinctly understood,
 that, entirely acquiescing in the propriety of the rule so
 qualified and explained, they should be extremely sorry
 if anything which has fallen from them should have the
 effect of impeding its full operation."

12. By the civil law, a will written by a person in his own favour was rendered void (a); and in *Crispell v. Dubois* (b), the Court, after stating the rule of the civil law, remarked that "though this rule of the civil law has not been adopted in our Courts, they do demand satisfactory proof in such cases that the party executing the will clearly understood, and freely intended to make the disposition of his property which the 'instrument' purports to direct" (c).

13. If the person who drew the will and who benefits by it stands in a fiduciary position towards the testator, the proof of the latter's knowledge of the contents of the instrument and his freedom from undue influence must be clear (d).

14. The circumstance of a solicitor preparing for his

(a) Dig. lib. 48, t. 10, s. 15; and lib. 34, s. 8.

(b) 4 Barb. 398.

(c) See further on this subject, *Reece v. Pressey*, 2 Jur. N. S. 380; *Durnell v. Corfield*, 1 Rob. 51; 3 L. T. 323; *Baker v. Batt*, 2 Moo. P. C. 317; *Greville v. Tylee*, 7 Moo. P. C. 320; *Paske v. Ollatt*, 2 Phillim. 323; *Darling v. Loveland*, 2 Curt. 225; *Wrench v. Murray*, 3 Curt. 623;

Jones v. Goodrich, 5 Moo. P. C. 16; *Major v. Knight*, 4 No. Cas. 661; *Cockcraft v. Rawles*, ib. 237.

(d) *Paske v. Ollatt*, sup.; *Ingram v. Watts*, 1 Hagg. 391; *Barton v. Robins*, 3 Phillim. 456, note. In the goods of *Edwards*, 3 S. & T. 10. But direct evidence is not required; circumstantial evidence is sufficient = *Raworth v. Marriott*, 1 M. & K. 643; 1 Williams Exors. 107 n. (s.)

client a will containing dispositions in his own favour, does not, however, prevent him from taking the benefit, if no undue influence is used. In *Hindson v. Weatherill* (a) a gift by will by a client to his solicitor, in gratitude for services rendered by the latter, of certain real estate and the sum of 1,000*l.*, the will having been drawn by the solicitor, was supported by the Court. The will had in this case, before execution, been shown to a disinterested person, to whom the testator expressed his approval of the gift made to the solicitor. Lord Justice Knight Bruce says (b), "As to the authorities cited, they seem to me all consistent with a conclusion in Mr. Weatherill's (the solicitor's) favour—it *being impossible* that a testamentary gift by a client to a solicitor can against the latter be liable to all the same considerations as a gift to him inter vivos would have been, though it may be open to some of them." And in the subsequent case of *Walker v. Smith* (c), the Master of the Rolls supported a will drawn by a solicitor, containing gifts of considerable amount to the solicitor, his wife and children (d).

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15. Wills drawn by medical attendants in their own favour during illness are regarded with peculiar jealousy. Though there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favourable circumstance for one in such a confidential position, with respect to a patient labouring under a severe disease, to take a large benefit under such patient's will, more particularly if it be executed in

(a) 1 Sm. & G. 609; 5 D. M. & G. 301.

(b) At p. 311 of rep. in 1 D. M. & G.

(c) 29 Beav. 394.

(d) See also *Barry v. Butlin*, 2 Moo. P. C. 490. For cases in which a will made by a solicitor in his own favour was set aside, see *Dufour v.*

Croft, 3 Moo. P. C. 136; *Waters v. Thom*, 22 Beav. 547. See also *Haddock v. Trotman*, 1 F. & F. 31, where the will contained a devise in favour of the mother of the attorney who drew the will, and was executed by the testatrix on her deathbed, and whilst she was in a state of great debility.

BOOK II. secrecy; and the whole transaction assumes the character
 CHAP. IX. of a clandestine proceeding. In such a case the onus will
 Sect. II. lie very heavily on the party benefited to maintain the
 validity of the will (a).

16. In a remarkable case (b) which lately came before the English Court of Probate, the Court had occasion to consider how far the principles by which Courts of Equity are guided in cases of undue influence in transactions taking effect inter vivos are applicable to gifts by will. A Roman Catholic lady left by will the bulk of her personalty to her priest absolutely, and free from trusts, and appointed him executor. Upon her death, he propounded the will as executor, the validity of which, after being opposed by the next of kin on the ground of undue influence exercised by the priest over the mind of the testatrix, was, by the direction of the judge, pronounced for by the verdict of a special jury. At the trial, the executor, the defendant, was called as a witness by the next of kin, the plaintiff, and cross-examined, but nothing was elicited from him to prove undue influence, beyond the fact that he was the spiritual adviser of the testatrix. A new trial was moved for, before Lord Penzance, Pigott, B., and Brett, J., on the ground that the judge had directed the jury to find for the defendant unless the plaintiff proved coercion; the plaintiff contending that, according to the well-established rule of the Courts of Equity in cases of undue influence, the onus should have been cast upon the defendant of proving that no undue influence was used (c). The application for a new trial was, how-

(a) *Ashwell v. Lomi*, L.R. 2 Prob. 477. See also *Greville v. Tylee*, 7 Moo. P. C. 320; *Jones v. Goodrich*, 5 Moo. P. C. 16; *Reece v. Pressley*, 2 Jur. N. S. 380; *Durnell v. Corfield*, 1 Rob. 51. See further on the subject of undue influence, the notes to *Huguenin v. Beasley*, 2 Tud. L. C. Eq. 462 to 503; *Fowler v. Wyatt*, 24

Beav. 237; *Schofield v. Templer*, 5 Jur. N. S. 619; *Lyon v. Home*, L. R. 6 Eq. 655.

(b) *Parfit v. Lawless*, L.R. 2 Prob. 462; 41 L. J. P. 68; 27 L. T. N. S. 215.

(c) See *White & Tudor's L. C.* 556 4 Ed.; *Hoghton v. Hoghton*, 15 Beav. 299; *Cooke v. Lamotte*, ib. 234.

ever, refused. Lord Penzance, in the course of an elaborate judgment, distinguishes between deeds and wills. After stating that the rule had been granted in order to consider a suggestion, strongly pressed, that the rules adopted in the Courts of Equity in relation to gifts *inter vivos* ought to be applied to the making of wills, he continues (a):

(a) "In equity, persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of Equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not, the law in this or any other Court regarding wills; and that, if this Court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another would remain the existing rule in regard to realty. 'One point, however, is beyond dispute,' said Lord Cranworth in *Boyse v. Rossborough* (b):

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(a) At p. 468.

(b) 1 H. L. C. p. 49.

BOOK II. 'and that is, that where once it has been proved that a
CHAP. IX. will has been executed with due solemnities by a person
SECT. II. of competent understanding, and apparently a free agent,
the burthen of proving that it was executed under undue
influence is on the party who alleges it. Undue influence
cannot be presumed.' But in truth the cases in equity
apply to a wholly different state of things. In the first
place, in those cases of gifts or contracts inter vivos there
is a transaction in which the person benefited at least
takes part, whether he unduly urges his influence or not
and in calling upon him to explain the part he took, and
the circumstances that brought about the gift or obligation,
the Court is plainly requiring of him an explanation
within his knowledge. But in the case of a legacy under
a will, the legatee may have, and in point of fact generally
has, no part in or even knowledge of the act; and to
cast upon him, on the bare proof of the legacy and his
relation to the testator, the burthen of showing how the
thing came about, and under what influence or with what
motives the legacy was made, or what advice the testator
had, professional or otherwise, would be to cast a duty on
him which in many, if not in most cases, he could not
possibly discharge. A more material distinction is this:
the influence which is undue in the cases of gifts inter
vivos, is very different from that which is required to set
aside a will. In the case of gifts or other transactions
inter vivos, it is considered by the Courts of Equity that
the natural influence which such relations as those in
question involve, exerted by those who possess it to obtain
a benefit for themselves, is an undue influence. Gifts
or contracts brought about by it are, therefore, set aside
unless the party benefited by it can shew affirmatively
that the other party to the transaction was placed 'i

such a position as would enable him to form an absolutely free and unfettered judgment' (a).

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(b) "The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

(c) "'The influence which will set aside a will,' says Mr. Justice Williams, 'must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear' (b). This difference, then, between the influence which is held to be undue in the case of transactions inter vivos, and that which is called undue in relation to a will or legacy, is all-important when a question arises of making presumptions or adjusting the burthen of proof. For it may be reasonable enough to presume that a person who had obtained a gift or contract to his own advantage and the

(a) *Archer v. Hudson*, 7 Beav. 551.

(b) 1 Williams Exors. Pt. 1, bk. 2, ch. 1, s. 2.

BOOK II. detriment of another, by way of personal advice
 CHAP. IX. suasion, has availed himself of the natural influence
 Sect. II. his position gave him. And in casting upon
 burthen of exculpation, the law is only assuming
 has done so. But it is a very different thing to
 without a particle of proof, that a person so situated
 abused his position by the exercise of dominion
 assertion of adverse control.

(d) "For these reasons, it seems to me that it
 improper and unjust to throw upon a man in the
 of the plaintiff, without any proof that he had
 whatever in the making of this will, the onus is
 negatively that he did not coerce the testatrix in
 ing the residue of her land to him. I say coercion
 is the only matter involved in a plea to undue
 Lord Cranworth appears, in the case above cited
 regarded fraud as a species of undue influence.
 mere question of terms; but, by the rules of practice
 established in this Court since December, 1865, fraud
 includes misrepresentation, is the subject of a
 plea, and undue influence as a term used in a plea
 court, raises the question of coercion, and that of

(a) In England it is not competent to the Court of Chancery, on the ground that legacies given by a codicil were obtained by undue influence, to declare the legatee a trustee for the person who would otherwise have taken—the objection on the ground of fraud must be taken

in the Probate Court *McPherson*, 1 H. L. C. 1 Wills, 23. But in this Court is authorized by try the validity of will on the ground of fraud influence: Con. Stat. s. 28.

BOOK THE THIRD.

OF THE MAKING AND EXECUTION OF WILLS.

CHAPTER I.

OF THE MODE OF WRITING AND FORM OF A WILL.

1. Statute of Frauds required that will of real estate should be in writing. Wills of personal estate must also generally be in writing.
2. Printing, lithographing, &c., equivalent to writing.
3. Will may be written on any material or in any mode.
4. Pencil writings considered deliberative.
5. Will may be written in any language. Contractions may be used.
6. A paper propounded as a will must have a testamentary character. Form of a paper immaterial. Examples.
7. A document making a "free gift" held testamentary on parol evidence.
8. Examples of papers held to be testamentary.
 - n. (f) Mistake in a codicil as to date or place of deposit of will immaterial.
9. A paper may be a will, though not taking effect until some time after the testator's death.
10. Parol evidence admitted to prove or disprove testamentary character of a paper.
11. Example furnished by *Lister v. Smith*. Parol evidence must be cogent and conclusive.
12. Case of "In the goods of *Poole*."
13. Not necessary that testator should intend to perform a testamentary act.
14. Rule laid down by Sir E. V. Williams.
 - n. (c) Court will give effect to an instrument as a will if it cannot operate in the way in which testator intended it should operate.
15. Paper not a will if it takes effect immediately.
16. A will must be a disposition of property to take effect after death.
17. Will may consist of several different papers or instruments. Examples.

- n. (b) When probate granted of several papers, the grant is to all the executors therein named.
18. Instructions may, in certain cases, be incorporated into the will.
19. No precise form of words necessary to a will. Examples of words creating trusts.
20. Courts indisposed to extend the rule creating trusts. Example.
21. General rule laid down by Lord Cranworth as to the creation of trusts by precatory words.
22. Rule laid down by Lord Langdale on same subject.
23. Will by two persons jointly.
24. Conjoint or mutual wills.
25. Agreement to leave property by will may be enforced.
26. Error in description of codicil immaterial.

BOOK III.

CHAP. I.

1. The Statute of Frauds required that a will of real estate should be in writing; and, as will appear in a future chapter, wills of personal estate must also generally be in writing (a).

2. It has been held that printing, lithographing, or engraving is equivalent to writing under the statute (b); and that pencil writing is sufficient (c).

3. A will may be written on any material and in any mode (d). It is advisable, however, that it should be written on vellum, parchment, or paper (e); and to prevent any doubt or question as to the authenticity of the document, the writing throughout should be by the same hand, and in ink of one colour (f).

4. Pencil writings formerly were, and no doubt they still are, as distinguished from writings in ink, considered deliberative. In *Bateman v. Pennington* (g), Lord Brougham said: "All the cases show that the sig-

(a) See post. Bk. III. c. III. a. III.

(b) In the goods of *Casmore*, L. R. 1 Prob. 653; 38 L. J. P. 54; 20 L. T. N. S. 497; 2 Black. Comm. 376—Chitty's notes; *Schneider v. Norris*, 2 M. & S. 286.

(c) In the goods of *Dyer*, 1 Hagg. 219; *Gregory v. Queen's Proctor*, 4 No. Cas. 623; Sugd. R. P. Stat. 351, 352.

(d) 1 Williams Exors. 106; Deane, Wills, 73.

(e) Shep. Touch. 54.

(f) *Greville v. Tylee*, 7 Moo. P. C. 320; *Birch v. Birch*, 1 Rob. 675; the goods of *Bacon*, 3 No. Cas. 645.

(g) 3 Moo. P. C. 227.

ing in pencil affords a *prima facie* presumption that the act is only deliberative; yet it may be shown to be otherwise." In that case the body of the will was in ink, but the date and signature were in pencil. The signature was preceded by the words: "In case of accident, I sign this my will." The testator died suddenly, and probate was allowed of the will so executed (a).

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5. It is immaterial in what language a will is written, if the testator's wishes are clearly and unambiguously expressed. Latin, French, or any other tongue may be used (b). Contractions or figures may be employed, or numbers and letters explained by a key (c). If a will be in a foreign language, resort must be had to the foreign law or language for the purpose of deciding on the meaning of the particular words used in the will; but, having so ascertained the meaning of the terms, the law of the testator's domicile governs the construction of the instrument, so far as concerns personal estate (d).

6. Any paper propounded as a will must have what is called a testamentary character, and must have been created by the testator *animo testandi*; but it is not necessary that it should be in a testamentary form. The form of a paper does not affect its title to probate, provided it was the intention of the deceased that it should operate after his death (e). Thus a deed poll or an in-

(a) See also, *In the goods of Adams* L. R. 2 Prob. 367; 41 L. J. P. 31; 26 L. T. N. S. 526.

(b) 1 Williams Exors. 105, 106.

(c) Deane, Wills, 73; *East v. Twyford*, 4 H. L. C. 517; 9 Ha. 713.

(d) See *Martin v. Lee*, 14 Moo. P. C. 142; 4 L. T. N. S. 657.

(e) 1 Williams Exors. 99.

BOOK III. denture (a); a deed of gift (b); a bond (c); marriage
CHAP. I. settlements (d); letters (e); drafts on bankers (f); the
assignment of a bond by endorsement (g); receipts for
stock and bills endorsed "For A. B." (h); an endorsement
on a note, "I give this note to C. D." (i); promissory
notes and orders on the testator's bankers (j); and an
instrument in the form of a power of attorney (k), have
been held to be testamentary (l).

(a) 2 Ves. 231; In the goods of *Cosmahan*, L. R. 1 Prob. 183; 35 L. J. P. 76; 14 L. T. N. S. 387; In the goods of *Montgomery*, 5 No. Cas. 99; 8 L. T. 294. But see In the goods of *Morgan*, L. R. 1 Prob. 214; 35 L. J. P. 98; 15 L. T. N. S. 894, where probate of a deed was refused; *Peacock v. Monk*, 1 Ves. Sen. 127; *Tomkyns v. Ladbroke*, 2 Ves. Sen. 591; *Shingler v. Pemberton*, 4 Hagg. 356; *Consett v. Bell*, 1 Y. & Coll. C. C. 569; *Doe d. Cross v. Cross*, 8 Q. B. 714; 10 Jur. 564; 15 L. J. Q. B. 517. See also *Attorney-General v. Jones*, 3 Price, 360; Vin. Abr. tit. "Devise" A, 2 (4).

(b) In the goods of *Webb*, 3 S. & T. 482; 10 Jur. N. S. 709; 33 L. J. P. 182; 11 L. T. N. S. 277; *Thorold v. Thorold*, 1 Phillim. 1, and cases there cited; *Ousley v. Carroll*, cited by Lord Hardwicke in *Ward v. Turner*, 2 Ves. Sen. 440; *Attorney-General v. Jones*, 3 Price, 368. But see also *Thompson v. Brown*, 3 M. & K. 32; *Sheldon v. Sheldon*, 1 Rob. 81-83; 8 Jur. 877; *Majoribanks v. Hovenden*, 1 Drury 11, coram Sugden, C.
(c) *Masterman v. Maberly*, 2 Hagg. 235.

(d) *Passmore v. Passmore*, 1 Phillim. 218; in Sir J. Nicholl's judgment. *Marnell v. Walter*, T. T. 1796, cited in 2 Hagg. 247, by Sir John Nicholl. See also In the goods of *Knight*, 2 Hagg. 554. But see In the goods of *Stoddart*, 2 S. & T. 356; 31 L. J. P. 195.

(e) *Habberfield v. Browning*, 4 Ves. 200, note; In the goods of *Mundy*, 2 S. & T. 119; 7 Jur. N. S. 52; 30 L. J. P. 85; 3 L. T. N. S. 380; *Repington v. Holland*, 2 Cas. temp. Lee 106; *Passmore v. Passmore*, 1 Phillim. 218; *Dryhutter v. Hodges*,

E. T. 1793, cited by Sir John Nicholl in 2 Hagg. 247; *Denny v. Barton*, 2 Phillim. 575; *Manly v. Lakin*, 1 Hagg. 130; In the goods of *Denn*, 1 Hagg. 448; In the goods of *Mulligan*, 2 Rob. 108; S. C.; 7 No. Cas. 271; In the goods of *Parker*, 2 S. & T. 375; *Herbert v. Herbert*, D. & Sw. 10. Where the language is "I appoint you my executor," &c., without naming any person in the body of the letter, probate will be granted to the person named on the address superscribed on the outside. In the goods of *Wedge*, Prerog. M. T. 1842; 2 No. Cas. 14; In the goods of *Taylor*, Prerog. M. T. 1845; 4 No. Cas. 238.

(f) *Bartholomew v. Henley*, 3 Phillim. 317; *Gladstone v. Tempel*, 2 Curt. 650; *Walsh v. Gladstone*, 1 Ph. 294; *Jones v. Nicholas*, 2 Rob. 288; S. C. 7; No. Cas. 564; In the goods of *Marsden*, 1 S. & T. 542; 6 Jur. N. S. 405; 2 L. T. N. S. 87.

(g) *Musgrave v. Down*, T. T. 1784, cited by the judge in 2 Hagg. 247.

(h) *Sabine v. Goate*, 1782, cited by the judge in 2 Hagg. 247.

(i) *Chaworth v. Beech*, 4 Ves. 563.

(j) *Jones v. Nicholas*, 2 Rob. 283; 14 Jur. 675; In the goods of *Marsden*, 1 S. & T. 542; 6 Jur. N. S. 405; 2 L. T. N. S. 87; *Gough v. Findon*, 7 Exch. 48; 21 L. J. Exch. 58; *Moss v. Shute*, H. T. 1799, cited by the judge in 2 Hagg. 247; *Longstaff v. Rennison*, 1 Drew. 28. See generally 1 Williams Exors. 99, 100.

(k) *Doe d. Cross v. Cross*, 8 Q. B. 714; 10 Jur. 564; 15 L. J. Q. B. 517.

(l) As to papers which have been held not to be testamentary, see *Thornicroft v. Lashmar*, 2 S. & T. 479; 8 Jur. N. S. 595; 31 L. J. P. 130; 6 L. T. N. S. 476.

7. In a recent case, a paper executed by the testator, beginning, "I hereby make a free gift to," &c., was allowed as a codicil to the will of the deceased, the Court admitting parol evidence to explain the intention of the deceased, and being satisfied that he intended the operation of the instrument to be dependent on his death (*a*). And, upon similar evidence, a paper in the following words: "I give myn sister, Louisa Cook, 104 York Road, Lambeth, to have my Schering (Charing) Cross bank-book for her own use," signed by the testatrix and attested by two witnesses, was held to be testamentary (*b*).

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8. In the goods of *Morgan* (*c*), the deceased having in his lifetime executed three deeds of gift, conveying all his property to trustees for the benefit of his children, but containing a proviso that they should not operate until his death, the Court granted probate of the three deeds as constituting his will (*d*). And in the goods of *Coulthard* (*e*), a paper described by the testator as a codicil, was admitted to probate, though no trace of a will could be found (*f*).

9. A testamentary paper duly executed is entitled to probate, although not intended to operate, and not be-

(*a*) *Robertson v. Smith*, L.R. 2 Prob. 43; 39 L. J. P. 41; 22 L. T. N. S. 417. See, also, in the goods of *Coles*, L. R. 2 Prob. 362; 41 L. J. P. 21; 25 L. T. N. S. 852, where the paper began in these words: "I have given all that I have to B." It was in other respects informal, but it was admitted to probate, evidence being given that it was executed as a will.

(*b*) *Cock v. Cooke*, L. R. 1 Prob. 241; 36 L. J. P. 5; 15 W. R. 89, 296. See also in the goods of *Coles*, L. R. 2 Prob. 362; *King's Proctor v. Davies*, 3 Hag. 218.

(*c*) L. R. 1 Prob. 214; 35 L. J. P. 98; 15 L. T. N. S. 894.

(*d*) See *Masterman v. Maberly*, 2 Hag. at p. 247; in the goods of

Jones, 1 S. & T. 155; 31 L. J. P. 199.

(*e*) 11 Jur. N. S. 184.

(*f*) See also in the goods of *Munday*, 7 Jur. N. S. 52; 30 L. J. P. 85; 3 L. T. N. S. 380; 2 S. & T. 119. A mistake in the codicil as to the date of the will to which the codicil is intended to be added, is immaterial, if the intention can be clearly shewn: In the goods of *Honblon*, 11 Jur. N. S. 549. See also in the goods of *Cooper*, 8 Jur. N. S. 394; in which an erroneous description in the codicil of the place in which the will was deposited, was held immaterial. See also in the goods of *Whitman*, 10 Jur. N. S. 1242; 34 L. J. P. 17.

BOOK III. coming operative until some time after the testator's
CHAP. I. death (a).

10. The testator's intention that a paper not testamentary in form, should operate as a will, may be proved by parol evidence (b). But where a person claims probate of a paper, not on the face of it clearly testamentary, the burthen of proof is on that person to satisfy the Court that it was executed *animo testandi* (c), and it is only to give effect to the intention, that a paper, not testamentary in form, will be held to bear that character (d).

11. The rule regarding the *animus testandi*, and the extent to which parol evidence may be admitted to show or rebut such *animus*, was fully considered by the Court in a remarkable case which came up recently for adjudication (e). The facts are stated in the judgment of Sir J. P. Wilde, who said: "This is a most remarkable case, and one which, since the trial, has given me some anxiety. The question raised is, whether a certain codicil is or is not entitled to be admitted to probate. It is regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved before the jury that the testator wished one of his family to give up a house which she then occupied, and that to force her to do so, he made pretence of revoking by codicil a bequest which he had made by will in favour of the daughter-in-law of this woman, and that the paper in question was made with that sole object; that the testator sent his at-

(a) In the goods of *News*, 7 Jur. N. S. 688.

(b) In the goods of *Webb*, 3 S. & T. 482; 10 Jur. N. S. 709; 33 L. J. P. 182; 11 L. T. N. S. 277; In the goods of *English*, 3 S. & T. 586; 34 L. J. P. 5; 11 L. T. N. S. 612; *Cock v. Cooke*, L. R. 1 Prob. 241; 36 L. J. P. 5; 15 W. R. 89, 296.

(c) *Thorncroft v. Lashmar*, 2 S.

& T. 479; 8 Jur. N. S. 595; 31 L. J. P. 150; 6 L. T. N. S. 476.

(d) *Patch v. Shore*, 9 Jur. N. S. 63; 32 L. J. Chan. 185; 7 L. T. N. S. 564; 2 Drew. & S. 589; and cases cited 1 Jarm. Wills.

(e) *Lister v. Smith*, 3 S. & T. 22; 10 Jur. N. S. 107; 33 L. J. P. 29; 9 L. T. N. S. 578.

ney instructions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all; further, that the attorney pointed out the folly of executing such an instrument, and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator, with express directions that he was not to part with it, and that it was in no event to operate or to revoke the bequest made in the will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution. A codicil, thus duly executed in point of form and attested by two witnesses, has been directly impeached by parol evidence. It bears all the appearance on the face of it of a regular testamentary act, but, on the evidence, it has been found by the jury not to have been intended as such by the testator. The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper, which appears to be the record of a testamentary act, was, in reality, the offspring of a jest, or the result of a contrivance, to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the Court should turn it into an effective instrument. And such, no doubt, is the law. There must be the *animus testandi*. In *Nicholls v. Nicholls* (a) the Court refused probate of a will regularly executed, which was proved to have been intended only as a specimen of the brevity of expression of which a will was capable; and in *Trevelyan v. Trevelyan* (b) the Court admitted evi-

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(a) 2 Phillim. 180.

(b) 1 Phillim. 149.

BOOK III. dence, and entertained the question whether the document
 CHAP. I. was seriously intended or not. In both cases, the Court held that evidence was admissible of the *animus testandi*. And to the same effect is the authority of Swinburne (a), and Shep. Touch. (b). The analogies of the common law point the same way. A deed delivered as an escrow, though regularly executed, is not binding, and in *Pym v. Campbell* (c) the Queen's Bench held, that a regular agreement signed by the party might be avoided by parol evidence, that, at the time of its signature, it was understood that it should not operate unless a certain event happened. There can therefore be no doubt of the result, in point of law, if the fact is once established. But here I must remark, that the Court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognizes and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance (d)."

12. In a late case, a will was drawn up with several blank spaces for the names of legatees, trustees, and executors, and for the amounts of legacies. The testator shortly before his death, signed the will at the solicitation of his friends, expressing doubts however as to its validity in consequence of the blanks not being filled up. The blanks were not filled up, because the testator did not possess the information necessary to enable him to do so correctly. He frequently expressed an intention of having a will

(a) Pt. 1, s. 3, pl. 23

(b) P. 404.

(c) 6 E. & R. 370.

(d) See also the recent case of *Worsley*, 4 S. &

T. 44 : 11 Jur. N. S. 5

J. P. 145, where the Court used evidence to show that the testatrix signed a will by w

made, so that he might fill up the blanks in a satisfactory manner. The Court, under these circumstances, felt justified in holding that the testator had an *animus testandi* when he signed the will (a).

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13. The authorities cited above indicate the rule, that it is not necessary for the validity of a testamentary instrument that the testator should intend to perform, or be aware that he had performed, a testamentary act (b); and that, if the paper contains a disposition of property to be made after death, though it were meant to operate as a settlement, or a deed of gift, or a bond; though such paper were not intended to be a will, or other testamentary instrument, but an instrument of a different shape, yet, if it cannot operate in the latter, it may nevertheless operate in the former character (c).

14. Sir Edward Vaughan Williams states the true principle deducible from the authorities to be (d)—that if there is proof either in the paper itself, or from clear evidence *dehors*—first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will; secondly, that death was the event which was to give effect to it, then, whatever may be its form, it may be admitted to probate as testamentary (e). And he further says:—"There seems to be this distinction in the consideration of papers which are in their forms

(a) In the goods of *Pool*, 1 L. R. Prob. 206; 35 L. J. P. 97; 14 L. T. N. S. 869.

(b) *Bortholomew v. Henley*, 3 Phillim. 318; 1 Williams Exors. 101.

(c) 1 Williams Exors. 101; *Mastron v. Maberly*, 2 Hagg. 207; in the goods of *Montgomery*, 5 No. Cas. 99; *Nicholls v. Nicholls*, 2 Phillim. 180; *Lister v. Smith*, 3 S. & T. 282; 10 Jur. N. S. 107; 33 L. J. P. 29; 9 L. T. N. S. 578; *Trevilgan v. Trevilgan*, 1 Phillim. 149.

(d) 1 Williams Exors. 102.

(e) The Court will give effect to an instrument intended as a will, even though it cannot operate in the particular manner in which the testator intended it should operate. See *Southall v. Jones*, 1 S. and T. 298; 5 Jur. N. S. 369; 27 L. J. P. 112; in which case a will purporting to be made in pursuance of a power which was inoperative as an appointment, was held valid, the testator having an absolute power of disposition outside of the power.

BOOK III. dispositive, and those which are of an equivocal
 CHAP. I. character, that the first will be entitled to probate unless they are proved not to have been written *animo testandi*, whilst, in the latter, the *animus* must be proved by the party claiming under them (a).

15. In a late case, application was made for probate of an instrument in the form of an agreement for a lease for seven years, which was duly executed and attested by two witnesses, and contained a proviso as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application; the Court, however, refused probate of the instrument, on the ground that it was not revocable, and that it came into operation immediately on its execution (b).

16. It is of the essence of a will that it should purport to be a disposition of property after death. "The Court," said Sir J. P. Wilde in a recent case (c), "cannot grant probate of a testamentary paper, unless it sees that it takes effect on something." Therefore, a paper, purporting to be a last will, duly executed, and containing simply an appointment of a guardian of his children by a father, and not disposing of personal property or appointing an executor, is not entitled to probate (d). And an instrument which disposed of no property, but simply declared an intention to revoke a previous will, was, in a recent case, held not to be a will or a codicil (e). There appears to

(a) 1 Williams Exors. 102; *Thorncroft v. Lashmar*, 2 S. & T. 479; 8 Jur. N. S. 595; 31 L. J. P. 150; 6 L. T. N. S. 476. See also 3 Hagg. 221; *Griffin v. Ferrard*, 1 Curt. 199; *Coventry v. Williams*, 3 Curt. 790, 791; In the goods of *Stoddart*, 2 S. & T. 356.

(b) In the goods of *Robinson*, L. R. 1 Prob. 384; 36 L. J. P. 93; 17 L. T. N. S. 19.

(c) In the goods of *Hubbard*, L. R. 1 Prob. 53.

(d) In the goods of *Morton*, 35 S. & T. 422; 33 L. J. P. 87; 9 L. T. N. S. 809.

(e) In the goods of *Fraser*, L. R. 2 Prob. 40; 39 L. J. P. 20; 21 L. T. N. S. 680. See also, In the goods of *Hicks*, L. R. 1 Prob. 683; 33 L. J. P. 65; 21 L. T. N. S. 300. And in another case, probate was refused to a will disposing only of property in a foreign country: In the goods of *Coode*, L. R. 1 Prob. 49.

objection to an instrument operating partly *in præ-*
as a deed ; partly *in futuro*, as a will (a).

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A will may consist of several distinct papers, which
court may construe as forming one testamentary dis-
tion (b). In a case where the testator by a will, fully
sing of his property, bequeathed various legacies,
nted executors, and named a residuary legatee, and
wards made another will beginning "This is my last
repeating some of the legacies in the same words,
ng others, and making additional ones, but naming
ecutor or residuary legatee—the Court held that the
documents were to be taken together as the testator's
(c). And in a late case, three duly executed testa-
ary papers bearing the same date, two of which dis-
l of the residue, were propounded as the testator's

The Court admitted parol evidence to shew that
rst paper was intended to apply only to certain prop-
erty in Canada, and that the two last papers were intended
ply only to certain property in England, and admit-
the three papers to probate as together constituting
st will of the deceased (d). In another case, where
stator, having erased a clause in his will after execu-
asked a friend to make a fair copy of the will, omit-

Doe d. Cross v. Cross, 8 Q. B.
Jur. 564; 15 L. J. Q. B. 517.
the goods of *Newns*, 7 Jur.
S. 688.

Williams Exors. 103; In the
of *Lewis*, 19 W. R. 1038; 25
S. 510; *Stone v. Evans*, 2
; In the goods of *Penwick*, L.
rob. 319; 16 L. T. N. S. 124;
goods of *Harris*, L. R. 2 Prob.
L. J. P. 48; 22 L. T. N. S.
In the goods of *Morgan*, L.
rob. 323; 36 L. J. P. 64; 16
N. S. 181; In the goods of
n, 5 No. Cas. 183; *Foley v.*
7 No. Cas. 119; In the
of *Graham*, 3 S. & T. 69; 8 L.
l. 610; 32 L. J. P. 113; In
ods of *Meredith*, 29 L. J. P.
n the goods of *Joy*, 30 L. J.

P. 169; In the goods of *Merritt*, 1
S. & T. 112; 4 Jur. N. S. 1192; In
the goods of *Leese*, 2 S. & T. 442; 31
L. J. P. 169; 5 L. T. N. S. 848;
Geaves v. Price, 3 S. & T. 71; 32 L.
J. P. 113; 8 L. T. N. S. 610; In the
goods of *Griffiths*, 26 L. T. N. S. 780;
20 W. R. 425. Where probate is
granted of two or more testamentary
papers as together constituting the
last will of the deceased, the grant is
made to all the executors named in
the several papers; In the goods of
Morgan, L. R. 1 Prob. 323; 36 L. J. P.
64; 16 L. T. N. S. 181.

(c) *Leslie v. Leslie*, 6 Ir. Eq. Rep.
332 Prob.

(d) In the goods of *Nickalls*, 4 S.
& T. 40; 34 L. J. P. 103.

BOOK III. ting the erased clause, and the copy was made, but the
CHAP. I. person who made it by mistake omitted several other clauses, and the new will, which did not contain an express clause of revocation, was duly executed, but the omissions were not discovered until after the testator's death, probate was granted of both documents upon parol evidence of the circumstances under which they were drawn, as together forming one will (a).

18. Though instructions for a will which, standing alone, would constitute a good will, are *prima facie* superseded or revoked by a will subsequently executed (b), yet, where the subsequent will is operative only by reference to the instructions, the will and instructions may both be admitted to probate, as together constituting the last will of the testator (c).

19. No precise form of words is necessary to the validity of a disposition in a will; and language which would be held sufficient to create a trust, will also usually constitute a good devise or bequest. The following expressions have been held to be imperative, and to amount to a trust, "will and desire" (d), "request" (e), "wish and request" (f), "recommend" (g), "entreat" (h), "not doubting" (i), "in the fullest confidence" (j), "authorize and empower" (k), "well know" (l), "earnestly conjured" (m), "most earnestly wish" (n), "recommend" (o).

20. The late decisions indicate a reluctance on the part

(a) *Birks v. Birks*, 4 S. & T. 23; 34 L. J. P. 90; 13 L. T. N. S. 193.

(b) *Wood v. Goodlake*, 2 Curt. 129.

(c) *Hitchings v. Wood*, 2 Moo. P. C. 355.

(d) *Eeles v. England*, 2 Vern. 466.

(e) *Eade v. Eade*, 5 Mad. 118.

(f) *Foley v. Parry*, 5 Sim. 138.

(g) *Tibbets v. Tibbets*, 19 Ves. 656.

(h) *Prevost v. Clarke*, 2 Mad. 458.

(i) *Parsons v. Baker*, 18 Ves. 476.

(j) *Wright v. Atkyns*, 17 Ves. 255; *Shovelton v. Shovelton*, 32 Beav. 143.

(k) *Brown v. Higgs*, 4 Ves. 708.

(l) *Briggs v. Penny*, 3 M.N. & G. 546.

(m) *Winch v. Brutton*, 8 Jur. 1066.

(n) *Young v. Martin*, 2 Y. & Coll. C. C. 582.

(o) *Cunliffe v. Cunliffe*, Prec. in Ch. 201. See also 3 Story's Eq. Jur. ss. 1069, 1070; 1 Williams Exors. 103.

the Courts to carry the doctrine beyond the limits fixed to it by the earlier cases (a). In a late case a testatrix made a bequest of "all my property to my husband, hoping he will leave it after his death to my son if worthy of it," accompanied by the following explanations: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a fortune, and that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my husband, in whose honour, justice, and parental affection I have the fullest confidence. If my son dies before my husband, though I leave all with reservation to my dear husband to dispose of as he thinks fit, yet, should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles and clear judgment of right and wrong, and his sense of justice." The words used were held not to create a trust (b).

BOOK III.
CHAP. I.

1. The general rule, as stated by Lord Cranworth in *Williams v. Williams* (c), is as follows:—"The real intention in all these cases always is, whether the wish or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of which he thinks would be a reasonable exercise of discretion of the party, leaving it, however, to the party to exercise his own discretion" (d).

2. The requisites that precatory words may create a

Knott v. Cottee, 2 Ph. 192;
At v. Boughton, 11 C. & F.
Webb v. Woods, 2 Sim. N. S.
Green v. Marsden, 1 Drew,
Langston v. Langston, 21
552; *Huskinson v. Bridge*, 4
L. & S. 245; *Fox v. Fox*, 27
301; *Quayle v. Davidson*, 12
P. C. 268; *Scott v. Key*,
100 L. J. 291. *Wilson v. Bell*, L.
Ch. Ap. 581.

(b) *Eaton v. Watts*, L. R. 4 Eq.
151; 16 L. T. N. S. 311.

(c) 1 Sim. N. S. 358.

(d) This rule has been followed in
late cases. *Bernard v. Minshall*,
Johns. 276; *Bonsor v. Kinnear*, 6
Jur. N. S. 882; *Liddard v. Liddard*,
6 Jur. N. S. 439; *Howarth v. Dewell*,
6 Jur. N. S. 1360.

BOOK III. trust have been said by Lord Langdale, M. R., to be—
 CHAP. I. first, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain (*a*); and these three requisites must co-exist.

23. A will may be made by two persons jointly. Such a will, in effect, constitutes two distinct wills, of which separate probates will be granted (*b*). But if the will so provides, probate must be delayed till the death of both (*c*).

24. Conjoint or mutual wills, duly executed, become irrevocable, in Equity, after the death of either party (*d*).—During the lifetime of either party, however, such a will may be revoked (*e*).

25. An agreement to leave property by will may be enforced (*f*). Thus, where in consideration of B. and C. agreeing to execute a conveyance of property, part of the father's estate, to a purchaser, A. verbally promised to leave them as much as they would get under their father's will: it was held that A.'s estate was bound to make good the promise, and that the case did not come within the 4th section of the Statute of Frauds (*g*).

(*a*) *Knight v. Knight*, 3 Beav. 173.

(*b*) In the goods of *Stracey*, Deane, Ec. Rep. 6; 1 Jur. N. S. 1177.

(*c*) In the goods of *Raine*, 1 S. & T. 144; In the goods of *Lovegrove*, 8 Jur. N. S. 442; 31 L. J. P. 87; 6 L. T. N. S. 131; 2 S. & T. 453; Ex parte *Day*, 1 Bradf. Sur. Rep. 476.

(*d*) *Lord Walpole v. Lord Orford*, 3 Ves. 402; S. C. 7 T. R. 138; *Hinckley v. Simmons*, 4 Ves. 160. See as to the view taken of "mutual

wills" by the Courts, *Hobson v. Blackburn*, 1 Add. 277; Deane's Wills, 21; *Dufour v. Pereira*, 1 Dick. 419; *Price v. Denchurst*, 8 S. & T. 279; 4 M. & C. 76; *Chester v. Urwick*, 23 Beav. 107.

(*e*) 1 Williams Exors. 10.

(*f*) *Loftus v. Maw*, 3 Giff. 592. See 8 Jur. N. S. Pt. 2, p. 281, where the cases are reviewed.

(*g*) *Ridley v. Ridley*, 11 Jur. N. S. 475; 34 Beav. 478; 34 L. J. Ch. 462; 12 L. T. N. S. 481.

26. When a codicil to a will was incorrectly described as being a codicil to a will which had previously been revoked, the error was held not to affect the validity of the codicil (a).

BOOK III.
CHAP. I.

(a) In the goods of *Law*, 21 L. T. N. S. 399.

CHAPTER II.

OF THE EXECUTION AND ATTESTATION OF WILLS OF REAL ESTATE.

SECTION I.

Of the Statutes relating to the formalities of Execution.

1. Difference in the forms necessary to execution of wills of realty and personalty respectively, significant of relative estimation in which they were formerly held.
2. Execution of wills of real estate governed by the Statute of Frauds—Provisions of that Statute.
3. Clauses of Statute of Frauds relating to wills repealed in England by 1 Vict. c. 26, and in this Province by 'The Wills Act, 1873.' Effect of Con. Stat. U. C. c. 82, s. 13.
4. Provisions of "The Wills Act, 1873," s. 7, as to the mode of executing wills.
5. Section 8 of same Act, as to powers of appointment.
6. Section 10 of same Act dispenses with publication.
7. Section 2 of same Act limits the application of the Act to wills made after 31st December, 1873.
- n. (a) Meaning of word "republished" considered.
8. The 7th section of "The Wills Act, 1873," adopted from the 9th section of 1 Vict. c. 26.



BOOK III.
CHAP. II.
Sect. I.

1. The wide difference which at present exists in Ontario between the forms required by law for the due execution of wills of real estate, and those required for the making of wills of personalty, is significant of the relative estimation in which realty and personalty were formerly held by the law of England. On the one hand, we find that a devise of real estate must be signed by the testator, and such signature attested by competent witnesses; on the other, we find that unsigned and unwitnessed scraps of writing may be admitted to probate as good wills of personalty.

2. The forms necessary to the due execution of wills

of real estate were prescribed by the Statute of Frauds (a). By the 5th section of that statute it was enacted, "That all devises or bequests of any lands, or tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

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CHAP. II.

Sect. I

3. The provisions of the Statute of Frauds which relate to the execution of wills of real estate have been repealed in England by the new Wills Act, 1 Vict. c. 26; but they remain as yet unrepealed in Ontario (b), though they have been slightly modified by our Statute, 4 W. 4, c. 1, s. 51 (c), by which it is provided, that "Any will affecting land, executed after the sixth day of March, one thousand eight hundred and thirty-four, in the presence of, and attested by, two or more witnesses, shall have the same validity and effect as if executed in the presence of, and attested by, three witnesses; and it shall be sufficient if such witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator."

4. "The Wills Act, 1873" (d), repeals those sections of the Statute of Frauds (e) relating to wills, which had not been theretofore repealed in this Province. By s. 7 of the new Act, it is provided that "No will shall be valid un-

(a) 29 Car. 2, c. 3.

(b) "The Wills Act, 1873," repeals the provisions of the Statute of Frauds which relate to the execution of wills—as to all wills made on or after the 1st January, 1874.

(c) Con. Stat. U. C. c. 82, s. 13.

(d) Stat. Ont. 36 Vict. c. 20.

(e) Ss. 5, 6, 12, 19, 20, 21 & 22.

BOOK III. less it shall be in writing, and executed in manner here-
CHAP. II inafter mentioned; that is to say, it shall be signed at
SECT. I. the foot or end thereof by the testator, or by some other
person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary: Provided always, that every will, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, shall be deemed to be valid, within the meaning of this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow, or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimony clause, or the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will, whereon no clause, or paragraph, or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of, the preceding side or page or other portion of the

the paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the proviso; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

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CHAP. II.
SECT. I.

5. S. 8 provides that "No appointment made by will, in exercise of any power, shall be valid, unless the same shall be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

6. S. 10 provides that every will executed in manner hereinbefore required, shall be valid without any other publication thereof.

7. S. 2 of the same Act provides, however, that, unless herein otherwise expressly provided, the Act shall not extend to any will made before the first day of January one thousand eight hundred and seventy-four, but every will re-executed or republished (a) or revived by any co-cil, shall, for the purposes of the Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived.

8. The 7th section of "The Wills Act, 1873," has been

(a) The word "republished" in this section, though contained in the English Statute, has no meaning. The section contemplates a re-execution of a will after the Act comes into force. Such re-execution must

be with the formalities prescribed by the Act, of which publication forms no part. (See s. 10.) Without such re-execution publication is of no avail. *Hayes & Jarm. Wills*, 58 n (t).

BOOK III. almost literally adopted from the 9th section of the Imperial Act, 1 Vict. c.26, as amended by 15 and 16 Vict. c.24.
 CHAP. II. The provisions of the Statute of Frauds, and of Con.
 Sect. I. Stat. U. C. c. 82, relating to the execution of wills, will not apply to such as are made after the 31st December, 1873; but as all wills made before that date must be governed, as to the mode of execution, by the present law, it is necessary to refer to the decisions upon the old statute; and as the new English Act contains many words which occurred in the Statute of Frauds, and which occur in "The Wills Act, 1873," such as "signed," "presence," "direction," "other person," "attested," "subscribed," the decisions of the English Courts upon the construction of these words will be useful guides for us. Bequests of personal estate were, by the English Act, and are, by our own statute, assimilated very nearly to devises of real estate; and therefore many of the decisions of the ecclesiastical courts, since the English Act came into force in regard to personal estate bequeathed, become of considerable importance to be considered, although of no direct authority in regard to real estate. The various material points will be considered in the order which they are presented by the Statutes.

SECTION II.

Of the mode in which a Will of Real Estate must be written.

1. Will must be in writing. Construction of the word "writing."
2. Will may contain blank spaces.

1. The Statutes prescribe that the will shall be in *writing* (a). A wide and reasonable construction has been

(a) The remarks contained in the preceding chapter as to the mode in which a will may be written, apply to wills of real as well as personal

estate. It is not thought necessary to repeat these remarks in this place.

given to the word "writing." It has been held that printing, lithographing, or engraving is equivalent to writing under the statute (a). The writing need not be with any particular substance; a will written in pencil has been held sufficient (b).

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2. It is no objection to a will, either under the old statutes or "The Wills Act, 1873," that it contains blank spaces; it is not required to be written continuously (c).

SECTION III.

Requirements in regard to signing Will.

1. The will must be signed by the testator.
2. If a will is signed by a mark, testator should be identified.
3. Modes in which signature may be made.
4. Sealing without signing insufficient.
5. One signature to the will sufficient, provided it was intended as a complete signature.
6. Not necessary under the Statute of Frauds that signature should be in any particular part of an instrument.
7. Examples of sufficient signature.
8. Provisions of "The Wills Act, 1873," as to the position of testator's signature.
9. Signature of testator in attestation or testimonium clause held sufficient under the English Act 15 & 16 Vict. c. 24.
10. Provisions of "The Wills Act, 1873," as to dispositions following the signature.
11. Instance of sentence excluded from probate.
12. Testator must, under new statutes, sign before the witnesses.
13. Will written on several sheets, or in several parts, considered.
14. Case where signature insufficient, being written on separate paper.
15. Testator may authorize some other person to sign for him.
16. Who may sign for the testator.
17. Practice of sealing wills unnecessary.
18. Express publication of a will was not necessary, and is expressly dispensed with by "The Wills Act, 1873."

(a) In the goods of *Casmore*, L. R. 1 Prob. 653; 38 L. J. P. 54; 20 L. T. N. S. 497; 2 Black. Comm. 376, Chitty's notes; *Schneider v. Norris*, 2 M. & S. 286.

(b) In the goods of *Dyer*, 1 Hagg. 219. It is of course desirable that wills, more especially when they

affect real estate, should be written in ink, on some durable substance, such as parchment or strong paper.

(c) *Corneby v. Gibbon*, 6 No. Cas. 679; 1 Rob. 705; In the goods of *Corder*, 1 Rob. 669; 12 Jur. 966; In the goods of *Kirby*, 6 No. Cas. 693.

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1. The statutes require that the will should be *signed by the testator*. The signature must be made with the object of executing the will (a). A signature by a mark is sufficient (b), even though the testator is able to write (c), and it is immaterial that the name of the testator who signs by a mark does not appear on the face of the instrument (d), or that a wrong name is added by one of the witnesses to the mark, if there is no doubt as to the testator having made the mark (e).

2. If a will signed by a mark is propounded under suspicious circumstances, the deceased should be identified as the alleged testator by independent evidence. Thus, when a plaintiff propounded as a will a paper purporting to have been executed by a markswoman in the presence of two attesting witnesses, who also attached their marks thereto; and the whole body of the will and the names of the supposed testatrix and the witnesses were in the handwriting of the plaintiff, who, under it, took almost the entire property; and the alleged will, although in the custody of the plaintiff, was not offered for probate until many years after the death of the testatrix, and evidence was given of the execution of the paper by some person in the presence of two witnesses, but, except by the testimony of the plaintiff, such person was not identified as the deceased, the Court refused to grant probate of the paper (f).

3. The signature of his own or a witness's name by a

(a) *Dunn v. Dunn*, L.R. 1 Prob. 277; 15 L.T.N.S. 216.

(b) *Clarke v. Clarke*, 2 Ir. R.C.L. 395, Q.B.

(c) In the goods of *Field*, 3 Curt. 752; *Baker v. Dening*, 8 A. & E. 94; S. C. nom. *Taylor v. Dening*, 2 Jur. 775; 3 N. & P. 228; In the goods of *Douce*, 2 S. & T. 593; 8 Jur. N. S. 723; 31 L.J.P. 172; 6 L.T.N.S. 789; *Harrison v. Harrison*, 8 Ves. 184.

(d) In the goods of *Boyes*, 3 Curt. 325; In the goods of *Redding*, 3 Rob. 339; 14 Jur. 1052; In the goods of *Glover*, 11 Jur. 1022.

(e) In the goods of *Clarke*, 1 S. & T. 22; 4 Jur. N.S. 24; 27 L.J.P. 18; In the goods of *Douce*, 2 S. & T. 593; 8 Jur. N. S. 723; 31 L.J.P. 172; 6 L.T.N.S. 789.

(f) *Edmonds v. Leaver*, 11 Jur. N. S. 911.

person authorized by the testator to sign for him, has been allowed as a good signature by the testator (a); and a signature by the testator's initials has also been allowed as sufficient (b). And where a testator, who was so crippled as to be unable to write, signed his will by means of a stamp engraved with his name, which he habitually used, the stamp being applied to the will by a person acting under his direction, it was held that the will was validly signed, the Court remarking that it is immaterial whether a mark be made with a pen or any other instrument (c). The signature to her will by a married woman in the name of her deceased first husband is good (d); and the signature by an assumed name is sufficient, being considered by the Court equivalent to a mark (e). If the testator is too weak to write, his hand may be guided (f).

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4. The sealing (without signing) of a will by the testator is not a due execution (g).

5. One signature to the will is of course sufficient, though the will should extend over several sheets of paper (h). It must appear, however, that the signature made was intended as a complete signature; for, if it appears that the testator intended a further signature which he never made, the will must be considered as unsigned (i).

6. It may be laid down as a general rule, that it is not

(a) In the goods of *Ullersperger*, 6 Jur. 156; In the goods of *Clark*, 1 S. & T. 22; 4 Jur. N.S. 24; 27 L. J. P. 18; In the goods of *Blair*, 6 N. Cas. 528.

(b) In the goods of *Savory*, 15 Jur. 1042; In the goods of *Hinds*, 16 Jur. 1161.

(c) *Jenkyns v. Gaisford*, 3 S. & T. 93; 9 Jur. N.S. 630; 32 L.J.P. 122; 8 L.T.N.S. 517.

(d) In the goods of *Glover*, 5 No. Cas. 553; 11 Jur. 1022.

(e) In the goods of *Redding*, 2 Rob. 339; 14 Jur. 1062.

(f) *Wilson v. Beddard*, 12 Sim. 28.

(g) In the goods of *Summers*, 7 No. Cas. 562; *Smith v. Evans*, 1 Wils. 313; *Grayson v. Atkinson*, 2 Ves. Sen. 459; *Ellis v. Smith*, 1 Ves. 13, 15; *Wright v. Wakeford*, 17 Ves. 459; *Baker v. Dening*, 8 A. & E. 94; 2 Hayes' Conv. 642.

(h) *Winsor v. Pratt*, 5 Moo. 484; S.C. 2 Br. & B. 650; *Marsh v. Marsh*, 6 Jur. N.S. 390; 1 S. & T. 528. 30 L.J.P. 77.

(i) *Right v. Price*, 1 Doug. 241.

BOOK III. necessary, in order to satisfy the Statute of Frauds, that
 CHAP. II. the signature of a party should be placed in any particu-
 Sect. III. lar part of a written instrument ; but that it is necessary
 that the signature should be so introduced as to govern
 and authenticate every material and operative part of the
 instrument (a). The name of the testator may, therefo-
 be in any part of the will, provided it appears to have
 been inserted with the view of authenticating the will,
 will.

7. Thus, when the whole will was in the testator's
 handwriting, the name, occurring in the body, as the usual
 exordium, "I, A. B., do make," &c., was decided to be
 sufficient signing (b). So when the name of the testator
 was written by himself in the testimonium or the attesta-
 tion clause, the will was held to be well signed (c).

8. The provisions of "The Wills Act, 1873" (d), as to
 the position of the testator's signature, will relieve the
 Courts from the consideration of many nice questions
 which formerly arose in England under the Act 1 Vict.
 c. 26. This latter Act was amended by the Statute 15
 & 16 Vict. c. 24; and in our own Act the provisions of
 the amending Statute have been embodied.

9. But the question may still arise under "The Wills
 Act, 1873," as to whether the signature in the testimonium
 or attestation clause was intended for the testator's signa-
 ture to the will. Such a signature in the testimonium
 clause, which was all in the testator's handwriting, has

(a) *Caton v. Caton*, L.R. 2; H. L. C. 127; 36 L. J. Ch. 886; 16 W. R. 1; *Stokes v. Moore*, 1 Cox 219; *Ogilvie v. Foljambe*, 3 Mer. 53.

(b) *Lemayne v. Stanley*, 3 Lev. 1; 1 Freem. 538; 1 Eq. Cas. Ab. 403, pl. 9; *Cook v. Parsons*, Pre. Ch. 184; see also In the goods of *Walker*, 2 S. & T. 354; 8 Jur. N. S. 314; 31 L. J. P. 62; 5 L. T. N. S. 766; *Hilton*

v. King, 3 Lev. 86; *Grayson v. Atkinson*, 2 Ves. Sen. 454; *Coles v. Trevelthick*, 9 Ves. 249.

(c) In the goods of *Gunning*, 1 Rob. 459; 5 No. Cas. 75; In the goods of *Woodington*, 2 Curt. 324. See also In the goods of *Chaplyn*, 4 No. Cas. 469; 10 Jur. 210; In the goods of *Dinnmore*, 2 Rob. 641.

(d) S. 7.

held, in England, a sufficient signature under the Statute 15 & 16 Vict. c. 24 (a). And a signature without the attestation clause written or acknowledged by the testator in the presence of two witnesses who duly subscribed, which was shown to have been intended by the testator as his signature to the will, has been allowed sufficient under the same Statute (b). When the testator formed the concluding words of the last clause of the will, and it was shown that it was intended as a signature to the will, it was held sufficient (c).

The new Statute, it will be observed, provides that a signature under the Act shall be operative to give

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the goods of *Mann*, 28 L.J.

the goods of *Walker*, 2 S. & T. N. S. 314; 31 L. J. T. N. S. 766. See also the goods of *Torre*, 8 Jur. N. S. 4 v. *Smith*, L. R. 1 Prob. ur. N. S. 674; 35 L. J. P. T. N. S. 417.

Ex parte Skidmore, 2 S. & T. N. S. 760; 29 L. J. P.

the following cases upon whether or not the name in the attestation clause was intended as a signature to the will: In the goods of *Davis*, 4 No. 34; In the goods of *Atkins*, 4 No. 597; In the goods of *McCaslin*, 125; In the goods of *7 No. Cas. 228*. And as to a sufficient execution under the Wills Act, 1873, see the cases decided under the Statute: In the goods of *Powell*, 34; 34 L. J. P. 107; 13 S. 195; In the goods of *S. & T. 35*; 34 L. J. P. T. N. S. 195; In the goods of *12 L. R. 1 Prob. 5*; 11 S. 982; 34 L. J. P. 2; 13 S. 304; In the goods of *3 S. & T. 429*; 33 L. J. 121. In a late English case, when the deceased had an impropriety clause, and the testator appeared with the signatures of the attesters, and the witnesses

were both dead, and no evidence could be given as to the order in which the signatures had been made, the Court gave effect to a presumption that the will was duly executed and allowed probate: In the goods of *Puddiphatt*, L. R. 2 Prob. 97; 39 L. J. P. 84. As to the effect, under the provisions of "The Wills Act, 1873," of irregularities in the position of the testator's and witnesses' signatures, see the following cases decided upon the English Statute 15 & 16 Vict. c. 24: In the goods of *Archer*, L. R. 2 Prob. 252; 40 L. J. P. 80; In the goods of *Hammond*, 3 S. & T. 90; 9 Jur. N. S. 581; 32 L. J. P. 200; In the goods of *Casmore*, L. R. 1 Prob. 653; 38 L. J. P. 54; 20 L. T. N. S. 497; In the goods of *Rice*, 5 Ir. Rep. Eq. 176; *Hunt v. Hunt*, L. R. 1 Prob. 209; 35 L. J. P. 135; 14 L. T. N. S. 859; In the goods of *Coombs*, L. R. 1 Prob. 302; 36 L. J. P. 25; 15 L. T. N. S. 363; In the goods of *Huckvale*, L. R. 1 Prob. 375; 36 L. J. P. 84; 16 L. T. N. S. 434; In the goods of *Dalton*, L. R. 1 Prob. 189; In the goods of *Kempton*, 3 S. & T. 427; 33 L. J. P. 153; In the goods of *Ainsworth*, L. R. 2 Prob. 151; 23 L. T. N. S. 324, in which case the Court included in the probate of the will a sentence, part of which was below the testator's signature, being satisfied that this sentence was written before the will was signed.

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effect to any disposition or direction which is underneath, or which follows it; nor to any disposition or direction inserted after the signature shall be made. Numerous cases have been decided involving the construction of this section. In a late case, the deceased, in his will, which was written by himself on the first side of a half sheet of paper, gave his property to his wife for life, and then, intending to dispose of certain freehold cottages on the death of his wife, commenced a sentence, which he left incomplete. After the incomplete sentence was an asterisk with the words "See over." The will, which covered the whole of the first side, was executed at the bottom of that side; and at the top of the second side was another asterisk, and a devise of the cottages to his daughter: the devise was written before the will was executed. The Court held that the words on the second side should be included in the will. Lord Penzance said: "By 15 Vict. c. 24, s. 1, it is enacted that no signature under the Act shall be operative to give effect to any disposition which is underneath, or which follows it; but I think that the words, although, as written, they follow the signature, be read in the place in which the testator intended should be read, and, therefore, preceding the signature."

11. *In the goods of Arthur (b)*, the Court exclude probate a sentence in the will which was written the testator had signed, but before the witnesses affixed their signatures, though part of the sentence written above the signature of the testator (c).

- (a) *In the goods of Birt*, L. R. 2 Prob. 214; 40 L. J. P. 26; 24 L. T. N. S. 142.
- (b) *L. R. 2 Prob. 273*; 25 L. T. N. S. 274; 19 W. R. 1016.
- (c) See also upon this subject: *In the goods of Howell*, 2 Curt. 421; *In the goods of Davies*, 3 Curt. 748; *Keating v. Brooks*, 4 No. Cas. 253, 260; *In the goods of Jones*, 4 S. & T. 1; 11 Jur. N. S. 118; 13 L. T. N. S. 210; *Cotton*, 6 No. Cas. 30; *Topham v. Topham*, No. Cas. 272; *In the goods of Amis*, 7 No. Cas. 69, 1 F. Rob. 116. *Succelle* 4 S. & T. 6; 11 J. L. J. P. 42 11 I.

12. It is absolutely necessary, under the new Statutes, that the testator should sign before the witnesses subscribe their names (a).

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13. When a will is found written on several sheets, and the last only is signed and attested, *prima facie*, the presumption is, that they were all in the room and formed part of the will at the time of execution; and although, in one case, some of the provisions in the third part of the will were not consistent with those in the first, yet, as any one or two parts, without the rest, would have been manifestly imperfect, and the reasons for supposing that they were all attached together at the time of execution, were much stronger than any contrary presumption arising out of the inconsistency of some parts, they were all admitted to probate as the testator's will (b). And where a person has signed his name in the presence of witnesses at the end of several clauses of a dispositive character, apparently written at different times, the presumption is, that he intended to give effect to the whole of what was written at the time he so made his signature (c).

14. But in a recent case, a testatrix wrote three separate lists of legacies on three separate sheets of paper, the first of which was headed "Codicil to the Will of S. P.," and signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There being nothing in the contents of the three papers to

(a) In the goods of *Olding*, 2 Curt. 865; In the goods of *Byrd*, 3 Curt. 117; In the goods of *Hoskins*, 32 L. J. P. 158.

(b) *Marsh v. Marsh*, 6 Jur. N. S. 380; 1 S. & T. 528; 30 L. J. P. 77. *Gregory v. The Queen's Proctor*, 4 No. Cas. 620, 639.

(c) In the goods of *Cattrall*, 3 S. & T. 419; 10 Jur. N. S. 136; 33 L. J. P. 106. In a case which came before Sir C. Cresswell, the Court allowed probate of a will, the signature to which was written on a piece

of paper pasted on the corner of the parchment on which the will was written: In the goods of *Gausden*, 2 S. & T. 362; 8 Jur. N. S. 180; 31 L. J. P. 53; 5 L. T. N. S. 767. This decision was followed in *Cook v. Lambert*, 3 S. & T. 46; 9 Jur. N. S. 258; 32 L. J. P. 93; 9 L. T. N. S. 211. See also, In the goods of *Wright*, 34 L. J. P. 104; 4 S. & T. 35; 13 L. T. N. S. 195; In the goods of *West*, 9 Jur. N. S. 1158; 32 L. J. P. 182.

BOOK III. connect them with each other, and the first, which was
 CHAP. II. attested, being complete in itself, the Court refused to grant
 SECT. III probate to the two which were unattested (a); and where
 the names of the testator and the witnesses were written
 on a separate piece of paper, which was attached to the
 body of the will by wafers, one of the attesting witnesses
 being dead, and the other being unable to give an account
 of the state of the papers at the time the deceased signed
 her name, probate was refused (b).

15. The testator may, under the statute, authorize
 "some other person" to sign for him. Thus, a signature
 of the testator's name by the person who drew the will, the
 testator being too weak to sign, and having requested him
 to do so, and the will having been afterwards confirmed
 by the testator, was held to be a good signature (c); in
 such a case, however, the testator must plainly assent to
 the signature being made by deputy (d).

16. The witness to the will is a competent person to
 sign for the testator (e); and it is immaterial that he
 signed his own name instead of the name of the testator
 (f). And when the testator directed a person to sign the
 will for him, which that person did by writing at the foot,
 "This will was read and approved by C. F. B., by C. C., in
 the presence of," &c., and then followed the signature of
 the witnesses, the will was held good (g).

17. It is a common practice to cause the testator to seal,
 as well as sign, his will. But the ceremony of sealing is
 not prescribed by any of the statutes, and is therefore

(a) In the goods of *Pearse*, 1 L. R. 1 Prob. 382; 36 L. J. P. 117; 16 L. T. N. S. 853.

(b) In the goods of *Lambert*, 8 Jur. N. S. 158; 31 L. J. P. 118; 7 L. T. N. S. 219.

(c) In the goods of *Elcock*, 20 L. T. N. S. 757; see also in the goods of *Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Rob. 262; 9 Jur. 406; In the

goods of *Clark*, 2 Curt. 329; In the goods of *Blair*, 6 No. Cas. 528.

(d) In the goods of *Marshall*, 13 L. T. N. S. 643.

(e) In the goods of *Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Rob. 262.

(f) In the goods of *Clark*, 2 Curt. 329.

(g) In the goods of *Blair*, 6 No. Cas. 528.

necessary. Cases have occurred in which testators have depended upon the act of sealing alone as a sufficient execution of their wills. It would, perhaps, be well, therefore, to limit the execution of wills to the forms prescribed by the statute.

18. After some conflict of authority, it has been decided that publication of a will in express words is not necessary; but that it is sufficient if the testator acknowledges the instrument to the witnesses as his, though the nature of the instrument is not stated by him (a). The 10th section of "The Wills Act, 1873," which, it will be remembered, applies only to wills made on and after the 1st day of January, 1874, expressly provides that every will, executed in the manner required by the Act, shall be valid without any other publication thereof.

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SECTION IV.

the Mode of Subscription and Attestation by the Witnesses.

- . Requirements of the Statute of Frauds and of Con. Stat. U. C., c. 82, s. 13.
- . Requirements of "The Wills Act, 1873."
- . Acknowledgment of signature by the testator to the witnesses sufficient.
- . Case of *White v. Trustees of the British Museum*.
- . Remarks of Sir H. J. Fust on that case.
- . Recent case of *Beckett v. Howe*.
- . Rule as to presumption that will was signed when presented to the witnesses.
- . Example of refusal by the Court to presume due signature.
- . Case of *Morritt v. Douglas*.
- . Acknowledgment may be made by person nearly blind.
- . Result of the cases on the subject of acknowledgment.
- . Case of *In the goods of Swinford*.
- . Misrepresentation by the testator of the nature of the instrument immaterial.

(a) 2 Greenleaf Ev. 675; *White trustees of the British Museum*, 6 F. 310; S. C. 3 M. & P. 689; *At v. Wright*, 7 Bing. 457; S. C. & P. 316; *Warren v. Postle-*

thwaite, 9 Jur. 721; *Johnson v. Johnson*, 1 C. & M. 140; S. C. 3 Tyr. 73; *Nott v. Genge*, 3 Curt. 160; 4 Moo. P. C. 265; 8 Jur. 323.

14. Case of *Crawford v. Curragh* stated.
15. Points presented by that case :
 - (a) State of the law under the Statute of Frauds;
 - (b) Provisions of our Acts;
 - (c) Difference between our Statute and the Statute of Frauds;
 - (d) The Statute of Frauds not repealed by our Act;
 - (e) No inconsistency in both Statutes subsisting together;
 - (f) Other reasons for holding the Statute of Frauds to be still in force;
 - (g) Conclusion arrived at by the Court.
- n. (a) Opinion of Draper, C. J., in *Ryan v. Devereux*. Positive evidence by the witnesses of the signing or acknowledgment not necessary.
16. Requirements of "The Wills Act, 1873" as to the presence of the witnesses.
17. Mode of subscription by the witnesses.
18. Attesting witness may authorize another to sign for him.
19. Witnesses must subscribe in presence of the deviser.
20. Running over a previous signature with dry pen insufficient.
21. Attestation clause and remarks thereon.
22. Case of *Roberts v. Phillips*.
23. Meaning of the word "subscribe" considered.
24. Presumption as to due execution.
25. Regularity of attestation clause supports presumption of due execution.
 - n. (c) Certificate of attestation not of same force as *vere voce* evidence. Remarks on the question of presumption under various circumstances.
26. Due execution may be presumed against the evidence of the witnesses.
 - n. (c) Remarks on presumptions.
27. A will may be supported by other evidence than that of the witnesses.
28. Witnesses should sign in such a place as to leave no doubt of the object of signature.
29. Alterations should be attested.

BOOK III. 1. The Statute of Frauds required that a will of real
 CHAP. II. estate should be *attested and subscribed* in the presence
 Sect. IV. of the testator by three or four credible witnesses. The
 law in this respect has been modified by 4 W. 4, c. 1, s. 51,
 re-enacted by Con. Stat. U. C. c. 82, s. 13; which provides
 that "Any will affecting lands, executed after the sixth
 day of March, one thousand eight hundred and thirty-
 four, in the presence of and attested by two or more
 witnesses, shall have the same validity and effect as if

ted in the presence of, and attested by three wit-
; and it shall be sufficient if such witnesses sub-
their names in presence of each other, although
names may not be subscribed in presence of the
or." The only change which the latter Statute
uced was, that two witnesses were made sufficient
d of three or four, and that the witnesses were per-
l to subscribe their names in presence of each other,
h they should not subscribe in the presence of the
or (a).

It will be observed that "The Wills Act, 1873" (b),
les that the signature of the testator shall be made
nowledged by him in the presence of two or more
sses, *present at the same time*, and such witnesses
ttest and shall subscribe the will in the presence
testator. These provisions materially differ from
of the Statutes at present in force (c).

A question arises, under the Statute of Frauds and
Stat. U. C., c. 82, s. 13, whether the testator must
ly sign his name in the presence of the witnesses,
ether an acknowledgment to the witnesses of his
ure previously made is sufficient.

It is now settled that such an acknowledgment is
ent; and that it is not even necessary that the tes-
should state to the witnesses the nature of the in-
ent which he wishes them to attest and subscribe (d).

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As the following cases upon
ject of acknowledgment in
to those mentioned in the
Lloyd v. Roberts, 12 Moo.
18; *Gaze v. Gaze*, 3 Curt.
Jur. 803; *Blake v. Knight*,
547; 7 Jur. 633; *Keirwin v.*
, 3 Curt. 607; 7 Jur. 840;
goods of *Ashmore*, 3 Curt.
the goods of *Thompson*, 4
. 643; In the goods of *Din-*

more, 2 Rob. 641.

In *Cooper v. Bockett*, 4 Moo. P.C.
419; 10 Jur. 931; the factum of a
will was held, under the circum-
stances of the case, to be sufficiently
proved, though one of the subscrib-
ing witnesses deposed that he did
not see all that the testator wrote,
only the large initial of his Chris-
tian name; and the other witness
stated that she did not see what he
wrote, but that he acknowledged the
paper to be his will in their joint
presence.

BOOK III. 4. In *White v. The Trustees of the British Museum* (C) it was held that a will was sufficiently attested when
 CHAP. II. subscribed by three witnesses in the presence and
 Sect. IV. the request of the testator, although none of the witnesses saw the testator's signature made, and only one of them knew what the instrument was. Chief Justice Tindal, in that case, considered the law as fully settled, that a bare acknowledgment by the testator of his handwriting is sufficient to make the attestation and subscription of the witnesses good within the Statute, although such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of signing.

5. Referring to the foregoing case, Sir H. J. Fust says: "This is a determination that where a testator had written a will himself, and signed it, and produces that will so signed (for that is a point never to be lost sight of) to witnesses, and desires them to sign their names, that amounts to an acknowledgment that the paper signed by them is his will; and the instrument is complete for its purpose: it is acknowledged by the testator to be his will" (b).

6. In the recent case of *Beckett v. Howe* (c), the Court allowed probate of a will executed under the following circumstances. The testator requested one person to witness his will, and another a paper. They both attended at the time and place appointed, when the testator produced a paper so folded that no writing was visible, and

(a) 6 Bing. 310; S. C. 3 M. & P. 689.

(b) *Hott v. Genge*, 3 Curt. 160; 4 Moo. P. C. 265; 8 Jur. 323. See also *Wyndham v. Chetwynd*, 1 Burr. 44; *Smith v. Codron*, 2 Ves. Sen. 455; *Stonehouse v. Evelyn*, 3 P. W. 253; *Grayson v. Atkinson*, 2 Ves.

Sen. 454; *Ellis v. Smith*, 1 Ves. 11; *Addy v. Griz*, 8 Ves. 504; *Westbeach v. Kennedy*, 1 V. & B. 323; *Wright v. Wright*, 7 Bing. 457; in the goods of *Jones, D. & Sw.* 3; 1 Jur. N. S. 1096.

(c) L. R. 2 Prob. 1; 39 L. J. P. 1; 21 L. T. N. S. 400.

informed them that, in consequence of his wife's death, it was necessary to make a change in his affairs, and he asked them to sign their names to it, which they did. The testator did not sign in their presence, nor did they see his signature; but the paper had an attestation clause upon it in the handwriting of the testator.

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7. The point involved in this case really was whether the Court could, under the circumstances, presume that the signature was upon the will at the time the witnesses subscribed (a). The rule governing such a presumption is thus stated by Sir C. Cresswell, in the case of *Gwillim v. Gwillim* (b): "If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it, by asking them to witness his will, the proof of the execution would fail, but that certainly is not necessary. I am therefore at liberty to judge, from the circumstances of the case, whether the name of the testator was on the will at the time of the attestation, or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not know that he must sign it before they did, and either sign it or acknowledge it in their presence." Acting upon the rule thus laid down, the learned judge who decided *Beckett v. Howe* gave effect to a presumption that, in that case, the will had been signed by the testator, when presented to the witnesses (c).

8. In another case, however, when the testator asked the witnesses to sign their names to a paper, but he did

(a) See *In the goods of Hammond*, 3 S. & T. 90; 9 Jur. N. S. 581; 32 L. J. P. 200, where the Court refused to admit the paper to probate.

(b) 3 S. & T. 200; 29 L. J. P. 31.

(c) See also *Smith v. Smith*, L. R. 1 Prob. 143; 12 Jur. N. S. 674; 35 L. J. P. 65; 14 L. T. N. S. 417; *In the goods of Huckvale*, L. R. 1 Prob. 375; 36 L. J. P. 84; 16 L. T. N. S.

434. See also *Olver v. Johns*, 39 L. J. P. 7; 21 L. T. N. S. 597, in which case the Court upheld the will, though one of the witnesses did not see the testator's name, it being shown that the other witness had experience in the making of wills, and the attestation clause being regular.

Book III. not execute the paper in their presence, nor did they,
 Chap. II. when they subscribed their names, see any writing, the
 Sect. IV. Court refused probate of the paper (a). It is evident
 that the circumstances of this latter case were not suffi-
 cient to create the presumption which was acted upon
 in *Beckett v. Howe* (b).

9. In a very recent case (c), it appeared that the witnesses,
 on being introduced into the testator's room, were informed
 by a person present that he wished them to sign Thomas
 Morritt's (the alleged testator's) will. Morritt sat by,
 without making any remark; but the will was not read
 over to him in the presence of the witnesses, nor was any
 allusion made to it, except the remark first made to the
 witnesses. The witness stated that he thought the de-
 ceased was not exactly in his right mind at the time. The
 witness saw a mark to the will when he signed; but he
 could not say who made it. Sir James Hannen refused
 probate of the will, remarking that the evidence failed to
 satisfy him that the deceased either acknowledged the
 mark to be his, or that he knew what the contents of the
 alleged will were.

10. An acknowledgment of his signature may be made
 by a testator who is so blind that he can hardly distin-
 guish night from day (d). An acknowledgment will be
 presumed from the attendant circumstances (e); but in
 such cases it is considered necessary that the witnesses
 before they sign should actually see that the document

(a) In the goods of *Pearson*, 10 Jur. N. S. 372; 33 L. J. P. 177.

(b) See also *Pearson v. Pearson*, L. R. 2 Prob. 451; 40 L. J. P. 53; 24 L. T. N. S. 917; 19 W. R. 1014; and *Kelly v. Keatinge*, 5 Ir. Rep. Eq. 174 Prob., in which latter case it was held, that where the signature of a testator is apparent on a will, when it is presented to the witnesses for attestation, it is sufficient that it

might have been seen by them, whether they actually observed it or not.

(c) *Morritt v. Douglas*, L. R. 3 Prob. 1; 27 L. T. N. S. 501; 9 Can. Law J. N. S. 137; 21 W. R. 162.

(d) *King v. Berry*, 5 Ir. Rep. Eq. 309, Prob.

(e) In the goods of *Rapen*, 1 Curt. 909. See also 3 Curt. 174.

bears the testator's signature (a). An acknowledgment of his signature may be made by the testator by gesture (b).

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11. The result of the cases upon the subject of the acknowledgment of a signature which is not made in the presence of the witnesses, is stated by an eminent writer (c) to be, that where the testator produces the will, with his signature visibly apparent on the face of it, to the witnesses, and requests them to subscribe it, this is a sufficient acknowledgment of his signature; but not where they are unable to see the signature, and the testator merely calls them in to sign, without giving them any explanation of the instrument they are signing.

12. In a late case (d) before Sir J. P. Wilde, application was made for probate of a will which appeared to have been regularly executed. The witnesses stated, however, that, at the time of execution, the deceased did not refer to the paper as a will. There was no evidence that the deceased's signature was on the paper at the time. The learned judge refused the application, remarking, "In all the cases that have been decided, either the testator has signed his name in the presence of the witnesses, or his signature has been, or might have been, seen by the witnesses; or he has informed them that the paper they were about to sign was his will" (e).

13. Even should the testator misrepresent to the wit-

(a) *Hott v. Genge*, 3 Curt. 160; 4 Moo. P. C. 265; 8 Jur. 323; *Hudson v. Parker*, 1 Rob. 14; 8 Jur. 786; *Shaw v. Neville*, 1 Jur. N. S. 408.

(b) In the goods of *Davies*, 2 Rob. 337. For cases in which the acknowledgment was held insufficient, see in the goods of *Ashton*, 5 No. Cas. 548; in the goods of *Summers*, 2 Rob. 295; 7 No. Cas. 562; in the goods of *Allen*, 2 Curt. 331; in the goods of *Clifford*, 16 L. T. 266; in the goods of *Harrison*, 2 Curt. 863;

5 Jur. 1017; in the goods of *Rawlings*, 2 Curt. 326; in the goods of *Simmonds*, 3 Curt. 79; in the goods of *Trinder*, 3 No. Cas. 275. See Sugd. R. P. Stat. 339.

(c) 1 Williams Exors. 84.

(d) In the goods of *Swinford*, L. R. 1 Prob. 630; 38 L. J. P. 38; 20 L. T. N. S. 87.

(e) See *Gwillim v. Gwillim*, 3 S. & T. 200; *Finnicombe v. Butler*, 3 S. & T. 560.

BOOK III. nesses the nature of the instrument, stating it to be
 CHAP. II. deed, and not a will, the misrepresentation will not affect
 Sect. IV. the validity of the execution (a).

14. In the case of *Crawford v. Curragh* (b), the changes in the old law which were effected by Con. Stat. U. C., c. 82, s. 13, were fully discussed. The circumstances of this case, as detailed by Gibson, one of the witnesses to the will, were as follows: "One morning when I called on the testator (Joseph Boyd), old Mrs. Boyd, the mother, said that Joseph was wasting away fast, and had settled his affairs. Mary, one of the deceased's sisters, went out, and she saw Pollard, who was since dead, come in, and they went into the room where Joseph was. Pollard had the will in his hand. He said (to witness), 'Will you witness the will of Joseph Boyd?' Joseph was sitting in an arm-chair within four or five feet, and he heard what was said. He (Pollard) said he had witnessed it before, and he said he understood it required another witness. He then opened it, and showed it to Joseph Boyd, and said, 'This is your will, Mr. Boyd;' and Boyd nodded assent that it was. I then signed my name as witness in presence of Joseph Boyd. I think Pollard folded it up and took charge of it. I did not see Samuel Pollard sign his name to it. I did not see Joseph Boyd sign his name. I did not hear him speak about it: he only nodded his head in assent to what Pollard said. I don't know when the will was signed by Joseph, or when Pollard signed his name there."

15. This case presented for the consideration of the Court many of the points on the question of attestation and subscription which we have already considered, and some points also which were raised by the new Statute. In the first place, the testator did not sign in the pre-

(a) *Trimmer v. Jackson*, 4 Burn. E. 130; *White v. Trustees Brit. Museum*, 3 M. & P. 689; 6 Bing. 310.
 (b) 15 U. C. C. P. 55.

sence of the witnesses, but only acknowledged that the instrument was his will. In the second place, the witnesses did not subscribe in the presence of each other. In the third place, it could not be directly shown that Pollard subscribed in presence of the testator. The judgment of the Court was delivered by Adam Wilson, J., who, after stating the provisions of the fifth section of the Statute of Frauds, already referred to, observes:

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(a) "Under this state of the law, it was not necessary the testator should actually sign his name in the presence of the witnesses; an acknowledgment by him of his signature in their presence was sufficient. The case in 6 Bing. 310, quoted in the argument, and many other cases, established this. So, also, it was long since held, and continued to be the law in England until the Wills Act of 1837 was passed, and it is still the law here, that the acknowledgment so made need not be by the testator to all the witnesses at the one time or in the presence of each other, but that this may be done at different times, and that the witnesses may subscribe their names at different times, and not in the presence of each other (a.) The witnesses were, however, according to the plain words of the Statute, always required to subscribe in the presence of the devisor.

(b) "By our present law, it is provided that 'Any will affecting land, executed after the 6th March, 1834, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if such witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator.'

(a) *Jones v. Lake*, 2 Atk. 176, Note; *Ellis v. Smith*, 1 Ves. 11.

BOOK III. (c) "One part of the controversy here is, whether *the*
 CHAP. II. last clause of this section, 'and it shall be sufficient,' &c
 SECT. IV. is an enactment that the witnesses *shall* subscribe *their*
 names in the presence of each other, or is a mere declar-
 ation that if the witnesses do not subscribe their names *in*
 presence of the testator, as under the prior law, the *will*
 shall not nevertheless be void, but that it shall be suffi-
 cient if the witnesses do subscribe in the presence of *one*
 another?

(d) "The Statute of Charles has not, in express terms,
 been repealed as to wills; and, so far as it has not been
 repealed by enactments inconsistent with its maintenance
 in part or in whole, there is no reason why it may not be
 considered as still an active law here. Now, under that
 Statute, it was a positive direction that the witnesses
 should subscribe and attest the will *in the presence of the*
devisor, otherwise the will should be utterly void and of
 none effect.

(e) "There is nothing inconsistent in our amended law
 and this provision subsisting together; on the contrary, it
 rather seems that the Legislature intended that this part
 of the old law should yet continue to be the law; leaving
 it, however, to the devisor to pursue either the new law
 or the old law, according to circumstances or his own con-
 venience—that is, either to see the witnesses subscribe the
 will, or if he did not, they should see each other subscribe
 it. And, therefore, we are of opinion that under the pro-
 vision 'it shall be *sufficient* if such witnesses subscribe
 their names in presence of each other, *although their names*
may not be subscribed in presence of the testator,' the law
 of this Province does not prevent a will being still sub-
 scribed by the witnesses in the presence of the devisor, as
 it might have been before the passing of the late Act,
 under the Statute of Charles; and that the new provision

extended the old law, by making it *sufficient* if the witnesses see each other subscribe the will, although the deviser may not have seen them.

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(f) "There may, perhaps, be other reasons for treating the Act of Charles as not wholly rescinded as to wills in this Province. The primary object of the amended Act was to substitute two witnesses in the place of three. The new Act says nothing of the will being *in writing*, although that would be implied from the context. Nor does it say that the will shall 'be executed' by the party 'vising,' although that may also, perhaps, be inferred. Nor does it say that the will may be executed 'by some other person in his presence, and by his express direction,' which, perhaps, cannot be implied. The Act, therefore, is not a complete law in itself, and does not profess to be so, but it assumes all these provisions to be still subsisting; otherwise the Legislature, in professing to remove unnecessary difficulties in the way of such instruments, would have taken care not needlessly, in these respects, to have added to them."

(g) The learned judge then adverted to the other disputed or doubtful point in the case—namely, whether Willard did or did not subscribe his name in the presence of the testator; and, after weighing the facts, he considered that he would be justified in presuming the affirmative of that question. He then says (a), "We are of opinion, then, that, although the will was not subscribed by the witnesses in the presence of each other, it was not, nevertheless, void for that cause, but that a subscription by him in the presence of the deviser was, if it be estab-

(a) At p. 61.

BOOK III. lished, a sufficient subscription according to our law
 CHAP. II. And the will was sustained (a).

SECT. IV. 16. "The Wills Act, 1873," requires that both the witnesses must be present together when the will is signed by or by the direction of the testator, or when the signature is acknowledged by him (b). The witnesses must also sign in presence of the testator; but they need not sign in presence of each other (c).

17. We have next to consider (d) what is a sufficient subscription by the witnesses. It may be laid down as a general rule, subject to the exception hereinafter noticed, that a witness may subscribe in any manner in which the testator may sign. A mark will therefore be a sufficient sub-

(a) Chief Justice Draper, in *Ryan v. Devereux* (26 U.C.Q.B. 107), uses language from which it might be inferred that he doubts the soundness of the judgment in *Crawford v. Curragh*. He says, "I advisedly abstain from expressing an opinion of concurrence in or dissent from that decision. I have not arrived at any positive conclusion upon it." See observations in Leith's R. P. Stat. 291. Positive affirmative evidence by the subscribing witnesses as to the fact of the signing or acknowledgment of the will by the testator in their presence is not absolutely essential; and the Court may, in the absence of any suspicious circumstances, presume a due execution. Per Adam Wilson, J., in *Crawford v. Curragh*, 15 U.C.C.P. 60, 61; *Blake v. Knight*, 3 Curt. 547; 7 Jur. 633; *Hitch v. Wells*, 10 Beav. 84; *Gwillim v. Gwillim*, 3 S. & T. 200; 29 L.J.P. 31; In the goods of *Huckvale*, L.R. 1 Prob. 375; 36 L.J.P. 84; 16 L.T.N.S. 434; and it is favourable to this presumption if the witnesses, or either of them, or the testator, have had experience in the execution of legal documents. *Plenty v. West*, 9 Jur. 458; *Oliver v. Johns*, 39 L.J.P. 7; 21 L.T.N.S. 597; *Lloyd v. Roberts*, 12 Moo. P.C. 158. See also the following cases, in which it was held that there was no sufficient acknowledgment: In the

goods of *Allen*, 2 Curt. 331; In the goods of *Ashton*, 5 No. Cas. 548; In the goods of *Clifford*, 16 L.T. 266; In the goods of *Harrison*, 2 Curt. 863; 5 Jur. 1017; In the goods of *Rawlings*, 2 Curt. 326; In the goods of *Simmonds*, 3 Curt. 79; In the goods of *Trinder*, 3 No. Cas. 275. See Sugden's R. P. Stat. 339.

(b) In the goods of *Mansfield*, 1 No. Cas. 364; In the goods of *Ayles*, 1 Curt. 913.

(c) *Faulds v. Jackson*, 6 No. Cas. Supp. 1; *Chadwick v. Palmer*, cited D. & Sw. 2; In the goods of *Webb*, D. & Sw. 1; 1 Jur. N.S. 1096; In the goods of *Allen*, 2 Curt. 331; In the goods of *Simmonds*, 3 Curt. 79. But see *Casement v. Fulton*, 5 Moo. P.C. 130, in which the same Court held, without adverting to their previous decision, that the witnesses must attest in the presence of each other, on the ground that the word "such" in the statute must embrace what has been said above of their presence, and must mean "the witnesses &c. present at the same time." See the remarks upon this case in 1 Williams Exors. 86 n. (i); see also *Slack v. Busted*, 6 Ir. Ch. Rep. 1; Sugd. R.P. Stat. 342.

(d) As to the meaning of the word "attest," see *Doe v. Burdett*, 6 M. & Gr. 386; 10 C. & F. 340; *Warren v. Postlethwaite*, 2 Coll. 115 n.

ion (*a*), even though the witness can write (*b*). The testator may also subscribe by initials (*c*); or by a fictitious name (*d*), if used without the purpose of personating another (*e*); or by the witnesses' description (*f*); but a testator's seal is not a sufficient subscription (*g*). It is now held that a subscription by an attesting witness, unable to write, by holding the top of the pen, while his name is written by another for him, is sufficient, inasmuch as he takes part in the signing (*h*). And the hand of the witness, in writing his signature, may be guided (*i*).

The attesting witness may direct another person to write his name for him as attesting the will; though he may himself take some part in the signing which will be sufficient on the will (*j*). What is done by the witness must be done clearly with the object of attesting the will. It will not be sufficient if the proposed witness superintends the execution of the will, and makes a mark for the attesting witness, if, through inadvertence, he neglects to write his own name (*k*).

As the Statute requires the witnesses to subscribe in the presence of the testator, care must be taken that this requirement is strictly complied with. A subsequent acknowledgment of a signature previously made is

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see d. Davis v. Davis, 9 Q.B. 648; 182; 16 L. J. Q. B. 97; *see v. Harrison*, 8 Ves. 186; *Grix*, ib. 504; In the goods of *ore*, 3 Curt. 756.

In the goods of *Amiss*, 2 Rob. 10. Cas. 274.

In the goods of *Christian*, 2 No. Cas. 265.

In the goods of *Oliver*, 2 Ecc. Rep. 57.

see v. Pryor, 29 L. J. P.

In the goods of *Sperling*, 9 S. 1206; 3 S. & T. 272; 33

25; 9 L. T. N. S. 348. In the goods of *Byrd*, 3 Curt.

(*h*) *Lewis v. Lewis*, 2 S. & T. 153; 4 L. T. N. S. 583; S. C. nom.; In the goods of *Lewis*, 7 Jur. N. S. 688; 31 L. J. P. 153.

(*i*) *Harrison v. Elvin*, 3 Q. B. 117; 6 Jur. 849; In the goods of *Prith*, 4 Jur. N. S. 288; 27 L. J. P. 6.

(*j*) In the goods of *Mead*, 6 Jur. 351; 1 No. Cas. 456; In the goods of *Cope*, 2 Rob. 335; In the goods of *White*, 7 Jur. 1045; 2 No. Cas. 461; In the goods of *Duggins*, 39 L. J. P. 24; 22 L. T. N. S. 182.

(*k*) In the goods of *Eynon*, L. R. Weekly Notes, 28th June, 1873, p. 148.

BOOK III. not sufficient. Thus, in a case decided under the English
 CHAP. II. Statute 1 Vict. c. 26, which requires, as does "The Wills
 Sect. IV. Act, 1873," that the execution or acknowledgment by the
 testator should be in presence of two witnesses *present at the same time*, it was shown that the deceased produced his will, with his signature attached, to one witness, who subscribed his name; and subsequently the deceased acknowledged his signature in the presence of the first witness and of another person, and the latter then added his signature, but the first witness merely wrote the day of the month, and supplied a clerical defect in his signature previously made; it was held on appeal to the House of Lords that, although the deceased acknowledged his signature in the presence of two witnesses present at the same time, such witnesses did not, within the meaning of the Statute, attest and subscribe the will in the presence of the testator (a). And in the case of *Moore v. King* (b), a testator signed a codicil in the presence of a witness (his sister), who, at his desire, attested and subscribed it. On a subsequent day, when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying, in the presence of both parties and pointing to his signature, "This is a codicil signed by myself and by my sister, as you see; you will oblige me if you will add your signature, two witnesses being necessary." That party then subscribed in the presence of the testator and his sister, the latter, who was standing by him, pointing to her signature and saying, "There is my signature; you had better place yours underneath." She did not, however, re-subscribe; and it was held by Sir H. Jenner

(a) *Hindmarsh v. Charlton*, 8 H. L. C. 160; 7 Jur. N. S. 611; 4 L. T.N.S. 125; S.C. in Probate Court, 1 S. & T. 433; 5 Jur. N. S. 581; 28

L. J. P. 132, affirmed; In the goods of *Allen*, 2 Curt. 331.
 (b) 3 Curt. 243; 7 Jur. 205.

First, that the instrument was not sufficiently attested under the new Statute.

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20. And running over a previous signature with a dry pen is not a sufficient subscription (a); nor is the addition to a former signature of the witness's residence sufficient (b).

21. The names of the witnesses are usually written under an attestation clause at the end of the will; and, though this clause is unnecessary, and, if used, need not be in any particular form of words, yet it is as well to insert it, as it usually shows the state of facts under which the attestation is made. A learned writer (c) remarks that in a practical point of view the attestation clause is really of much more importance than would generally occur at the first glance. It serves to show that the testator, or the person preparing the will, was aware of the specific requirements for the due execution of the instrument. And this of itself will raise a strong presumption, that these known and remembered requirements would naturally, and almost necessarily, have been complied with, since it is proverbially true, that errors in the execution of wills and other legal instruments occur more commonly from mistake, misapprehension, and inattention, than from any other cause; so that, if they are once brought to the mind of the testator near the time of the execution of the instrument, it renders it highly improbable that they would not be attended to. This enumeration on the face of the will, and especially in the attestation clause, which is expressly subscribed by the witnesses, aids them too, in knowing, and being able to state more confidently, precisely what did occur; and at the same time gives the Court a more confident assurance that

(a) *Playne v. Scriven*, 2 No. Cas. 122; 1 Rob. 772; 13 Jur. 712; In the goods of *Simmonds*, 3 Curt. 79.

(b) In the goods of *Trevanion*, 2 Rob. 311; 14 Jur. 919.

(c) 1 Redf. Wills, 240, 241.

BOOK III. all the statutory requirements were complied with. For
 CHAP. II. is fair to presume, that the witnesses were made aware
 SECT. IV. what they did certify ; and, if so, that they would at the
 time have informed themselves of the facts thus attested
 by them. It is upon these grounds that the Courts have
 been so strongly inclined to sustain wills which, upon the
 facts stated therein, seemed to have been executed with due
 formality.



22. In the celebrated case of *Roberts v. Phillips* (a), the whole question of attestation and subscription was brought before the Court. Lord Campbell, C. J., said: "The first objection taken to the attestation of William Bevan was that nothing appears on the face of the will to designate him as a witness. But we think that this objection cannot be supported, if the will can be considered as subscribed by him within the meaning of the fifth section of the Statute of Frauds. It never has been held that a testimonium clause is necessary under this statute, or that the witnesses should be described as witnesses on the face of the will. Nothing more is required than that the will should be attested by the witnesses, namely, that they should be present as witnesses, and see it signed by the testator, and that it should be subscribed by the witnesses in the presence of the testator; namely, that they should subscribe their names upon the will in his presence. Even where a will is to be executed and attested under a power, in similar terms, the House of Lords, in *Burdett v. Spilsbury* (b), expressed a clear opinion that if, in point of fact, the will was executed in the presence of witnesses, as the power required, and the witnesses were proved simply to have subscribed their names on the will, the will would be valid."

(a) 4 E. & B. 450; 3 C. L. R. 513; 1 Jur. N. S. 444; 24 L. J. Q. B. 171. (b) 6 M. & Gr. 386; 7 Scott, N. B. 66; 10 Cl. & Fin. 340.

The learned Chief Justice then discussed the meaning of the word "subscribe," and held that, in the statute it no more than the word "sign;" and did not require signing beneath the testator's signature; and as to the effect of the absence of a testimonium clause it held that it would merely make a difference in the evidence which would be required to prove that the witnesses had seen the testator execute the will, and that they signed it with the intention of attesting it, at his request, and in his presence. Clear and satisfactory proof must be given on these points; but, such proof being given, the will ought to be held valid, although the signature of the witnesses is not under the signature of the testator (a).

It seems to be well settled that, in the absence of evidence, the witnesses being deceased, or not in condition to give testimony, the presumption, *omnia rite acta*, will prevail in ordinary cases, to support the due execution of the will (b).

Also, where the attestation is general, not enunciating the particulars, it will be presumed the will was executed, unless it appear to the contrary; and where the attestation clause contains all the particulars of the execution, it will always be *prima facie* evidence of due execution, and will often prevail over the evidence of the witnesses, who give evidence tending to show that some of the requisites were omitted (c).

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so Sugd. Pow. 229, 240, 241.
t v. *Skidmore*, 6 Jur. N.
oft v. *Pawlet*, 2 Str. 1109;
Wills, 79; In the goods of
Curt. 341. The contrary
f one witness is not suffi-
rebut this presumption
will appears to have been
ted, and the surrounding
ices favour the presump-
uch was the case. *Wright*

v. *Rogers*, L. R. 1 Prob. 678; 21 L.
T. N. S. 156; 38 L. J. P. 67. See
also *Bailey v. Frewen*, 19 W. R. 611
Prob., where the evidence of the wit-
nesses was doubtful.

(c) *Baylis v. Sayer*, 3 No. Cas. 22.
See also *Gove v. Gaven*, 3 Curt. 151;
Blake v. Knight, ib. 547; *Pennant v.*
Kingscote, ib. 642; In the goods of
Hare, ib. 54; *Cooper v. Bockett*, ib.
648; 1 Jarm Wills, 79. But it

Book III. 26. And where it appeared on the face of the will, "In
 Chap. II. witness whereof, I place my signature in the presence of
 Sect. IV. two witnesses," and the two witnesses, whose names ap-

seems the effect of the certificate of attestation by a deceased witness will not be regarded as of the same force as his evidence if he were living, but is evidence of an inferior nature. If supported by circumstances, although opposed by the testimony of another subscribing witness, it may be sufficient to support a verdict establishing the will; but, without any extraneous support, such a verdict against the positive testimony of a living witness could not be maintained upon that evidence alone. *Orser v. Orser*, 24 N. Y. R. 51. It was said, in a late case, *Vinnicombe v. Butler*, 3 S. & T. 580; 10 Jur. N. S. 1109; 34 L. J. P. 18, that the presumption *omnia rite acta* applies to the execution of a will where there is a perfect attestation clause, and this presumption is not overcome by the defective memory of the witness; and that where that clause is incomplete, the presumption also applies, but with less force; and where the attestation clause was defective, and the memory of the witness also, it being proved that the will was signed by the testator, and that the witness had been in the room with him for the purpose of attesting it, the presumption *omnia rite acta* was allowed to prevail, and the Court pronounced for the will.—Ib. See also, In the goods of *Luffman*, 11 Jur. 211; In the goods of *Dickson*, 6 No. Cas. 278; In the goods of *Leach*, 12 Jur. 381; *Dirrett v. Ware*, 30 L. T. 175; In the goods of *Thomas*, 1 S. & T. 255; *Gregory v. Quern's Proctor*, 4 No. Cas. 620; *Shield v. Shield*, 4 No. Cas. 647; In the goods of *Hare*, 3 Curt. 54; *Reeves v. Lindsay*, 3 Ir. Rep. Eq. 509 Prob.; In the goods of *Rees*, 34 L. J. P. 56. In a recent case two persons' names appeared as witnesses to a will, and the attorney who drew the will and who was present during its execution swore that these persons had duly signed the will as attesting witnesses, and other persons who knew their handwriting swore that the writing was theirs. They themselves, however, though admitting a striking resemblance be-

tween the signatures to the will and other signatures of theirs produced, denied having signed the will, and swore that the signatures to it were forgeries. Notwithstanding this adverse evidence, the Court, being satisfied the signatures were genuine, admitted the will to probate. *Myers v. Gibson*, 14 W. R. 901. But in another case, *Croft v. Croft*, 11 Jur. N. S. 183; 4 S. & T. 10; 34 L. J. P. 44; 11 L. T. N. S. 781, where the attestation clause was complete and signed by the witnesses at the foot, but, on examination, they deposed that the testator did not sign his name to the paper in the presence of either of them, nor did he in any way acknowledge the same in their joint presence, and there was no more evidence upon this point, the Court held they could not decree probate of the will upon the mere force of the presumption arising from the attestation clause, in opposition to the express testimony of both the witnesses that no sufficient execution did take place, there being no other testimony in the case; and especially as the attestation clause "was not written at the time, or read by the witnesses." The learned Judge, Sir J. P. Wilde, here cited the cases of *Owen v. Williams*, 32 L. J. P. 159; *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Gwillim v. Gwillim*, 3 S. & T. 200, as among the more recent cases bearing in favour of the will, but not being sufficient to maintain it. See also *Beach v. Clarke*, 7 No. Cas. 120; and *Croft v. Croft*, 4 S. & T. 1. Where the witnesses do not depose positively against the due execution, the presumption arising from the fact of the instrument appearing, its face, to have been duly executed, whether the attestation clause be complete or not, is always allowed to prevail as against the mere defect of memory in the witnesses, as to many one or more of the formal requirements of the law: In the goods of *Rees*, 34 L. J. P. 56. In *Gwillim v. Gwillim*, 3 S. & T. 200, the execution and attestation appeared regular upon the face of the will, and the attesting witnesses deposed that

on the face of the will, contradicted each other as to the fact of the will having been executed in their joint presence, it was held the will was entitled to probate, upon the ground that this fact was declared by the testator upon the face of the will (a). And the mere absence of the witnesses of the facts certified in the attestation clause is not regarded as any obstruction to the probate of the will (b).

The presumption of the due execution of the will is rebutted by proof that the witnesses are fictitious persons and that their names in the handwriting of the testator are not genuine.

There seems never to have been any serious question in practice in regard to allowing a will to be proved by evidence other than that of the witnesses, where the mode of execution had escaped the recollection of the witnesses, or where one or more of them deposed that the instrument was executed in their presence,

BOOK III.

CHAP. II.

SECT. IV.

not recollect having seen the testator's signature when they signed their names. The Court held that they were at liberty to consider the circumstances of the case, and whether it was probable that the testator's name was on the will at the time of attestation, of opinion that it was, and granted probate for the will. *Green v. Willoughby*, 6 Jur.

In the goods of *Holgate*, 5 Jur. 1 S. & T. 261; 29 L. J. 1007. *Stanton, D. & Sw. v. Gwillim*, 3 S. & T. 1 J. P. 31; In the goods of *2 Jur. 381; Dwyer v. Ware*, 15; In the goods of *Thompson*, 255; 5 Jur. N.S. 104; 33; 7 W.R. 270; *Gregory v. Proctor*, 4 No. Cas. 620; *v. Skewton*, 1 Rob. 10; *night*, 3 Curt. 547; *Vinniger*, 3 S. & T. 580. The local Courts have granted a will where both of the

witnesses deposed that the requirements of the Act were not complied with, the circumstances being of such a character as to convince the Court that the witnesses were mistaken: *Leech v. Bates*, 6 No. Cas. 699. But where the will was destroyed, and the only person present when the will was made swore that it was not duly executed, though there was reason to suspect that this evidence was untrue, and that the will was duly executed, the Court refused to grant probate: *Eckersley v. Platt*, L. R. 1 Prob. 281. The presumption *omnia rite acta*, it has been held, will only be made where the will, upon its face, appears to have been duly executed, or, being lost, proper evidence is adduced of such having been the fact: In the goods of *Gardner*, 27 L. J. P. 51; and the testator's own declarations to that effect are not sufficient: In the goods of *Ripley*, 1 S. & T. 68.

(c) In the goods of *Lee*, 4 Jur. N. S. 790.

BOOK III. or that all the requisite formalities had been complied
CHAP. II. with (a).

Sect. IV. 28. Care should be taken that the witnesses should sign in such a place as to leave no doubt of the object of their signature being to attest the will. Cases have occurred in which the Court has refused probate, because, though witnesses had signed, their signatures were so placed as to make it doubtful whether they intended to authenticate the will (b). In a late case, the deceased executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name in that character. The Court held that such person did not sign the will exclusively as an executor, but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that, consequently, the execution was valid (c).

29. Alterations by way of additions made in a devise affecting real estate after execution, must, in order to be operative, be authenticated with the same formalities as the original will (d).

(a) *Blake v Knight*, 3 Curt. 547; *Gregory v Queen's Proctor*, 4 No. Cas. 620; *Thompson v. Hall*, 2 Rob. 426; *Bayliss v. Sayer*, 3 No. Cas. 22; *Rennett v. Sharp*, 1 Jur. N. S. 456; In the goods of *Attridge*, 6 No. Cas. 598; 13 Jur. 88. See 1 Redf. Wills, 237 et seq. as to the attestation of wills. The cases will there be found collected.

(b) In the goods of *Wilson*, L. R.

1 Prob. 269; 36 L. J. P. 1; 15 L. T. N. S. 191; *Ryan v. Devereaux*, 25 U. C. Q. B. 100.

(c) *Griffiths v. Griffiths*, L. R. 2 Prob. 300; 25 L. T. N. S. 574; 41 L. J. P. 14. See also In the goods of *Sharman*, L. R. 1 Prob. 661; 38 L. J. P. 47; 20 L. T. N. S. 683.

(d) *Locke v. James*, 11 M. & W. 901.

SECTION V.

Presence of the Testator at the Attestation by the Witnesses.

1. Provisions of the Statutes as to the presence of the testator.
2. The testator must be in a conscious state ; mere bodily presence insufficient.
3. Testator should be aware that his will is being subscribed.
4. The subscription must be in a place where the testator can see.
5. Examples of the rule, *Shires v. Glasscock*.
6. Further example, *Davy v. Smith*.
7. Further example, *Casson v. Dade*.
8. Case of In the goods of *Trimnell*.
9. Cases in which execution insufficient, *Doe Wright v. Manifold*.
10. Case of *Eccleston v. Petty*.
11. Rule where testator unable to move without assistance.
12. Presumption of due attestation.
13. Rule where testator is blind.
14. Mode of attesting will of married woman under 16th section of Con. Stat. U. C. c. 73,
n (a). Opinion of Mr. Leith on the construction of this section.
15. Attestation of a codicil.
16. A duly executed codicil republishes and confirms a defective will.

1. The Statute of Frauds required that the witnesses should subscribe in the *presence* of the testator; and the Statute 4 W. 4, c. 1, s. 51 (a), allows the alternative of a subscription by the witnesses in *presence* of each other. "The Wills Act, 1873," also requires that the witnesses shall attest and shall subscribe in the *presence* of the testator (b). The construction of the word "*presence*" in our Acts, would, it is conceived, be the same as that given by the authorities to the same word in the Statute of Frauds.

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- (a) Con. Stat. U. C. c. 82, s. 13.
- (b) They need not, however, sign in presence of each other. *Faulds v. Jackson*, 6 No. Cas. Supp. 1; *Chadwick v. Palmer*, cited D. & Sw. 2; in the goods of *Webb*, D. & Sw. 1;

1 Jur. N. S. 1096; In the goods of *Allen*, 2 Curt. 331; In the goods of *Simmonds*, 3 Curt. 79. But see *Case-ment v. Fulton*, 5 Moo. P. C. 130; *Slack v. Busted*, 6 Ir. Eq. Rep. 1; Sugd. R. P. Stat. 342.

BOOK III. 2. It is first to be noticed that the testator must be in a
 CHAP. II. conscious state when the witnesses subscribe, and that his
 Sect. V. mere bodily presence is not sufficient (a). In one case, the testator, having signed his name whilst conscious, became insensible before the will was subscribed by the witnesses; and it was held that the will was not duly executed (b).

3. It is necessary also that the testator should be aware that his will is being subscribed by the witnesses. A clandestine subscription by them would not be sufficient (c).

4. The rule deducible from the authorities is that the will must be subscribed by the witnesses in a place where the testator can see what is being done; but that it is not necessary that the testator should actually see the subscription; it is sufficient if he *might* see it (d). The following cases will serve to illustrate this rule.

5. The testator, after signing his will in the presence of the witnesses, desired them to go into another room, some yards distant, to attest it. In this room there was a broken window, through which the testator *might* see them. The Court remarked, "It is enough if the testator *might* see; it is not necessary he *should actually see* them sign, for, at that rate, if a man shall turn his back, or look off, it shall vitiate the will" (e).

6. Again, the witnesses, after seeing the testator sign, took the will into another room, across a small passage, and, at a table in the middle of the room, set their names to it. Both rooms opened into the passage by doors opposite each other. The doors were open when the witnesses

(a) 1 Hayes Conv. 360, 363, 371; Taylor Evidence, 920; Hudson v. Parker, 1 Rob. 24; Hayes & Jarm. Wills, 17 n. q.

(b) *Right v. Price*, Doug. 241.

(c) 1 Jarm. Wills, 80; Longford v. Eyre, 1 P. W. 740.

(d) See, besides the cases referred

to in the text, the following: In the goods of Newman, 1 Curt. 914; In the goods of Colman, 3 Curt. 111; In the goods of Piercy, 1 Rob. 27; Norton v. Bazett, D. & Sw. 259; In the goods of Ellis, 2 Curt. 395.
 (e) *Shires v. Glascock*, 2 Salk. 688. See *Newton v. Clarke*, 2 Curt. 320.

signed, and the table was so placed that the testator could see the signing from the place where he lay. Though proof that he did see the witnesses subscribe was wanting, the Court held the will to be well executed, on the ground that he *might* have seen them (a).

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7. Again, a married woman, having power to execute a will, directed her attorney to prepare one, and then went to the attorney's office, but executed the will in her carriage in the presence of the witnesses, who then retired into the office and subscribed their names, the carriage meanwhile being so placed that the testatrix *might*, through the office window, see the witnesses subscribe. The Court considered the will to be well executed (b).

8. Again, the deceased executed his will by signing it in the presence of two witnesses, one of whom at once subscribed it in the same room. The will was then taken to an adjoining room and was there signed by the second witness. There was evidence that the doors of the two rooms were open at the time, and that the deceased, while in bed, *might* have seen that part of the table in the adjoining room on which the will was lying when the witness signed his name. The Court held the execution valid, Sir J. P. Wilde remarking, "The test in this case is whether the testator *might* have seen, not whether he *did* see the witnesses sign their names" (c).

9. On the other hand, when the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, it appeared that from one part of the testator's room a person, by reclining himself forward, might have seen the witnesses;

(a) *Davy v. Smith*, 3 Salk. 395.

(c) In the goods of *Trimnell*, 11

(b) *Casson v. Dade*, 1 Bro. C. C. Jur. N. S. 248.

39; Dick. 586.

BOOK III. but as the testator was not in that part of the room, it
CHAP. II. was held that the will was not validly executed (a).

Sect. V. 10. And in *Eccleston v. Petty* (b), where the witnesses proved that the testatrix signed the will in her bed-chamber, and they subscribed it in the hall; and it was not possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between these places, the will was held not to be duly attested (c).

11. If the testator is unable to move without assistance, and has his face turned from the witnesses, so that it is out of his power to see them if he so wished, the attestation will be insufficient (d).

12. Where the evidence fails to show in what part of the room the subscription took place, it will be presumed that the most convenient was the actual spot (e).

13. In the case of a blind testator, the position of the witnesses must be such that the testator, if he had had his sight, might have been able to see them sign (f).

14. The will of a married woman, made under the provisions of the 16th section of Con. Stat. U.C. c. 73 (g), must be executed in the presence of two or more witnesses, neither of whom is her husband. It is to be noticed that the Statute does not require the witnesses to subscribe their names; but it is conceived that the word "devise," which occurs in the Statute, would mean a devise executed with all legal formalities. The words 'in the same manner as if she were sole and unmarried,' which occur near the end

(a) *Doe d. Wright v. Manifold*, 1 M. & S. 294.

(b) *Carth.* 79; S. C. Comb. 156; 1 Show. 89.

(c) See also *Clerk v. Ward*, 4 Bro. P. C. 71.

(d) *Tribe v. Tribe*, 7 No. Cas. 132; 1 Rob. 775; 13 Jur. 793. In the

goods of *Killick*, 3 S. & T. 578 = 10 Jur. N. S. 1083; 34 L. J. P. 2.

(e) 1 Jarm. Wills, 82; *Winchell v. Wauchope*, 3 Russ. 444.

(f) In the goods of *Piercy*, 1 Rob. 278; 4 No. Cas. 250.

(g) This section is repealed by "The Wills Act, 1873."

of the section, would also, it is conceived, be held to apply to and govern the execution of the devise (a).

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15. The same formalities which are required in making a will, are also required in making a codicil (b). If the codicil should profess to deal with real estate, and should not be attested in the manner required for wills of real estate, it will be void, so far, at least, as the real estate is concerned.

16. A codicil sufficiently executed and attested to pass real estate, will, in cases governed by the present law, if written on the same paper as a will insufficiently signed and attested, operate to cure the defect in the will, on the principle that a codicil is a republication of the whole will (c). But where the attested codicil is detached from, and does not refer to the unattested will or previous codicil, it will not have the effect of curing the defective execution of such prior testamentary document (d).

SECTION VI.

Of the competency of the witnesses.

1. Credibility of the witnesses.
2. Word "credible" does not occur in Con. Stat. U. C., c. 82, s. 13, but they must be credible under that statute.
3. Whether witnesses must be credible at time of execution of will, or at time of judicial inquiry.
4. Persons interested in the will decided not to be credible.

(a) The meaning and effect of this section are fully considered by Mr. Leith, an author whose opinion is entitled to the highest respect.—Leith's R. P. Stat. 281 et seq. The writer observes that his conclusions are supported by the authority of Mr. Leith. The scantness of the provisions of the 16th section is a strong argument in favour of the conclusion, that devises by married women must be governed by the existing law as to the mode of execution.

(b) "The Wills Act, 1873," pro-

vides (s. 4) that the term "Will," in the Act, shall extend to a "Codicil."

(c) 1 Jarm. Wills, 107, 108; *De Bathe v. Lord Fingall*, 16 Ves. 167; *Doe d. Williams v. Evans*, 1 Cr. & Mees. 42; 3 Tyrw. 56; *Guest v. Willasey*, 12 J. B. Moo. 2; 3 Bing. 614.

(d) *Utterton v. Robins*, 1 Ad. & Ell. 423; 2 Nev. & M. 821; *Gordon v. Reay*, 5 Sim. 274. See also *Crosbie v. Macdoul*, 4 Ves. 610; *Pigott v. Wilder*, 26 Beav. 90; *Croker v. Hertford*, 4 Moo. P. C. 339; 8 Jur. 863; *Allen v. Maddock*, 11 Moo. P. C. 427.

OF THE EXECUTION OF WILLS OF REAL ESTATE.

5. Statute 25 Geo. 2, c. 6, passed to obviate the inconvenience of this rule. Witnesses deprived by that statute of all benefit under will.
6. Statute extends only to persons taking beneficial interest.
7. Provisions of "The Wills Act, 1873," sec. 11.
8. Section 12 of same Act.
9. Section 13 of same Act.
10. Section 14 of same Act.
11. The new Act applies to wills of personal as well as real estate.
12. Gift to wife of attesting witness.
13. Gift in a will not affected by the fact that legatee is a witness to the codicil.
14. Gift must be for the benefit of the witness to be void.
15. Evidence received to show for what purpose a legatee signs a will.

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OK III. 1. Having examined the law relating to the formalities  
 CHAP. II. required in the making of wills of real estate, we have to  
 Sect. VI. consider the subject of the *credibility* of the witnesses, for the Statute of Frauds requires that the witnesses to a will of real estate should be *credible*.

2. It will be observed that the word "credible" does not occur in Con. Stat. U. C. c. 82, s. 13, but it has been decided that the character of the witnesses is not altered by that Act (a). A credible witness is one who, at the time of the execution of the will, or of giving testimony, was or is not rendered incompetent to give testimony by reason of infancy, insanity, mental imbecility, interest, crime or any other cause (b).

3. It was for some time an open question, whether the time of the execution of the will, or the time of the judicial inquiry into its sufficiency, was the period at which the witnesses must be competent. The better opinion seems to be that the witness must be credible when he attests the will (c). "At what time," said Lord Camden, in

(a) Per Draper, C. J., *Ryan v. Devereux*, 26 U.C.Q.B. 100. The witnesses to the will of a married woman, executed under the provisions of sect. 16 of Con. Stat. U. C. c. 73, must also, it is conceived, be credible witnesses. See observations in

Leith's R. P. Stat. 283.

(b) 1 Redf. Wills, 252; *Ryan v. Devereux*, 26 U.C.Q.B. 100.

(c) 1 Jarm. Wills, 65; *Brograve v. Winder*, 2 Ves. 636; 2 Greenleaf Ev. S. 691; *Anstey v. Downing*, 3 Str. 1253-1255.

the case of *Hindson v. Kersey* (a), "must the witnesses be **endued** with 'the qualification' (of credibility)? I say that **they** must be clothed with it at the time of attestation.

BOOK III.

CHAP. II.

Sect. VI

\* \* \* A will is often executed suddenly in a last sickness, and sometimes in the article of death, and a great question to be asked in such cases is, whether the testator **were** in his senses when he made the will, and *consequently the time of the execution is the critical moment which required guard and protection*. What is the employment of the witnesses?—It is to attest and to judge of the testator's sanity when they attest; and if he is not capable, they ought to refuse to attest. In some cases the witnesses are passive; here they are active, and, in truth, the principal parties to the transaction; the testator is entrusted to their care" (b).

4. It was early decided that, in analogy to the rule laid down by the Courts of Justice in civil matters, any person who derived any benefit under a will of real estate, should be considered an incompetent witness on the ground of interest; so that if a will had been witnessed by two indifferent witnesses, and by a third who was benefited by the will, it would be void; and void, not only as to that part which conferred an advantage or benefit on the witness, but altogether, and in every part (c).

5. This strict rule led, as may be supposed, to a great deal of inconvenience, to remedy which the Statute 25 Geo. 2, c. 6, was passed, which, after reciting that part of the Statute of Frauds which related to the credibility of the witnesses, provided that if any person should attest the execution of any will or codicil, to whom any bene-

(a) 4 Burn's E. L. 27.

(b) But in *Lowe v. Jolliffe*, 1 W. Bl. 385, a legatee after release was held a competent witness. Vide

also *Goodtitle v. Welford*, Doug. 139.

(c) 1 Jarm. Wills, 65.

BOOK III. ficial devise, legacy, estate, interest, gift or appointment  
 CHAP. II. of or affecting any real or personal estate other than, and  
 SECT. VI. except charges on lands, tenements, or hereditaments for  
 payment of any debt or debts, should be thereby given  
 or made, such devise &c. should, so far only as concerned  
 such person attesting the execution of such will or codicil,  
 or any person claiming under him, be utterly null and  
 void; and such person should be admitted as a witness  
 to the execution of such will or codicil within the intent  
 of the said Act, notwithstanding such devise; but it  
 was enacted (s. 2) that, in case by any will or codicil, any  
 lands, tenements, or hereditaments were or should be  
 charged with any debt or debts, and any creditor, whose  
 debt was so charged, had attested or should attest the  
 execution of such will or codicil, every such creditor, not-  
 withstanding such charge, should be admitted as a wi-  
 ness to the execution of such will or codicil within the in-  
 tent of the said Act.

6. This Statute does not extend to an executor or ad-  
 visee in trust, but is confined to persons beneficially in-  
 terested (a). Nor does the Statute extend to a case where  
 the witness takes an interest consequentially, and not  
 directly under the will (b). Thus, in a case in our own  
 Court of Queen's Bench (c), it was held that the Statute  
 did not apply where the will gave a small legacy to the  
 wife of one of the witnesses; and he was held disqualified  
 as a witness, being interested under the will. The Sta-  
 tute is confined in its operation to wills of real estate (d).

7. By "The Wills Act, 1873" (Stat. Ont. 36 Vict. c. 20),

(a) 1 Jarm. Wills, 67; *Lowe v. Jolliffe*,  
 1 W. Bl. 365; *Fountain v. Coke*, 1  
 Mod. 107; *Goodtitle v. Welford*,  
 Doug. 139; *Battison v. Bromley*, 12  
 East. 250; *Phipps v. Pitcher*, 6  
 Taunt. 220; S. C. 1 Mad. 144; *Holt*  
*v. Tyrrell*, 1 Barn. K. B. 12.

(b) *Hatfield v. Thorp*, 5 B. & Ad.  
 589.

(c) *Ryan v. Devereux*, 26 U. C. Q.  
 B. 100.

(d) *Emmanuel v. Constable*, 3 Em.  
 436; *Brett v. Brett*, 1 Hag. 58, n; *Per-*  
*ter v. Banbury*, 3 Sim. 40.

**the Statute 25 Geo. 2, c. 6, is repealed, and other and more ample provisions are substituted. S. 11 of the new Act provides that "If any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."**

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8. S.12 provides that "If any person shall attest the execution of any will, to whom, or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or of the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

9. S. 13 provides that "In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."

10. S.14 provides that "No person shall, on account of his being an executor of a will, be incompetent to be ad-

BOOK III. mitted a witness to prove the execution of such will, or a  
CHAP. II. witness to prove the validity or invalidity thereof."

Sect. VI. 11. The new Act applies to wills of personal as well as of real estate; and it extends the provisions of 25 Geo. 2, c. 6, to the wives and husbands of attesting witnesses, who, we have seen, were not within that Statute, and were not therefore admissible witnesses.

12. A gift to the wife of one of the witnesses will fail, though there should be two other competent witnesses who have attested (a). In a late case, however, when a testatrix, by her will, gave a share of her residuary real and personal estate to B., and one of the attesting witnesses to the will was B.'s wife, and by a codicil which was attested by other witnesses, the testatrix confirmed her will with some slight variation, it was held that the duly attested codicil had the effect of republishing and incorporating the will, so as to render the gift to B. valid, notwithstanding the attestation of the will by B.'s wife (b).

13. A gift in a will is not affected by the fact that the legatee is a witness to a codicil to the will, even though the effect of the codicil is to increase the interest which the legatee takes under the will (c). The representatives of a legatee who attested the cancellation of a clause in a will and died before the period of distribution, will be excluded from participation under the will in any benefit resulting from such cancellation (d).

14. If the devise or bequest to the witness is not given

(a) *Wigan v. Rowland*, 11 Ha. 157; 17 Jur. 910. See also *Ranfield v. Ranfield*, 32 L. J. Ch. 668; 11 W. R. 847; In the goods of *Toker*, 4 L. T. N. S. 183; In the goods of *Hartin*, ib. 839. See also the recent case of *Cozens v. Crout*, L. R. Weekly Notes, 28th June, 1873, p. 144.

(b) *Anderson v. Anderson*, L. R.

13, Eq. 381; 20 W. R. 313; 41 L. J. Ch. 247.

(c) *Gurney v. Gurney*, 3 Drew. 208; 1 Jur. N.S. 298; 24 L. J. Ch. 656; *Tempest v. Tempest*, 2 K. & J. 635; *Stocks v. Hammond*, 2 N. R. 307.

(d) *Gaskin v. Rogers*, L. R. 2 Eq. 284; 14 W. R. 707.



to him for his own benefit, but merely as a trustee for others, it will not be void under the Statute (a).

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15. Where a will has been witnessed by two witnesses, and, in addition to their signatures, the signature of a third person who is also residuary legatee, appears at the foot of the will, the Court will receive evidence to explain why such signature was written; and, if satisfied that it was not written with the intention to attest the signature of the deceased, it will order it to be omitted from the probate (b).

(a) In the goods of *Ryder*, 2 No. Cas. 462. *Cresswell v. Cresswell*, L. R. 6 Eq. 69; 37 L. J. Ch. 521; 18 L. T. N. S. 392; See also In the goods of *Mitchell*, 2 Curt. 916; In the goods of *Forest*, 2 S. & T. 334.

(b) In the goods of *Sharman*, L. R. 1 Prob. 661; 20 L. T. N. S. 683; 38 L. J. P. 47.

## CHAPTER III.

### OF THE EXECUTION OF WILLS OF PERSONAL ESTATE.

#### SECTION I.

##### *Of the Statutes relating to the formalities of Execution.*

1. State of the law regarding the execution of wills of personal estate unsatisfactory.
2. Opinion of the Real Property Commissioners as to the state of the law in England, before 1838.
3. Provisions of 1 Vict. c. 26, and of "The Wills Act, 1873."
4. Nature of papers now admitted as wills of personalty.
5. Wills of personalty, made prior to 1st January, 1874, governed by present law.

BOOK III. 1. The law of Ontario regarding the formalities necessary to the due execution of wills of personal estate is at present in a very unsatisfactory state. Though, as we have seen, a will of lands must be signed and attested with much formality; yet a will disposing of personalty may be good, though neither signed nor attested (a).

2. In England, at the beginning of the present reign, the expediency of altering the law regarding wills of personal estate was fully recognized. The Real Property Commissioners, to whom this, with other subjects, was referred, in their fourth report on the law of real property, observe (b), "That the informality of wills of personal estate has often been the subject of complaint. The question whether a paper is or is not testamentary, has been the occasion of a large proportion of the most vexatious and expensive lawsuits which have arisen on wills." And again (c), "Wills of personal estate in

(a) 1 Williams Exors. 64, 81; (b) At p. 15.  
Brett v. Brett, 3 Add. 224. (c) P. 7.

writing might be made in any form, and without any solemnity. It was not necessary that even the name of the testator should appear; any scrap of paper or memorandum in ink or in pencil, mentioning an intended disposition of his property, was admitted as a will, and would be valid, although written by another person, and not read over to the testator, or even seen by him, if proved to have been made in his lifetime, according to his instructions. If a will was imperfect, and it appeared upon the face of it that something more was intended to be done before it was finished, yet it was valid so far as it appeared to be complete, if it was proved that the testator's intention was arrested by sickness or death."

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3. By the English Statute 1 Vict. c. 26, wills of personal estate were, as regards the formalities of execution, placed on the same footing as wills of real estate; and by "The Wills Act, 1837," a similar change as to wills made after the 31st December, 1837, has been effected in the law of this Province. At the present time, however, the law sanctions the admission to probate, as wills of personalty, of such documents as engaged the attention of the Court, *In re Nelson* (a), mere scraps of writing, put together without care or reflection. The remark of Lord Hardwicke (b), "That there is nothing which requires so little solemnity as the making of a will of personal estate according to the ecclesiastical laws of this realm, for there is scarcely any paper writing which they will not admit as such," though made concerning the laws of England as they stood over a century ago, may with justice be applied to our law regarding wills of personalty at the present day.

5. Wills of personal estate made prior to the 1st Jan-

(a) 14 Grant, 199.

(b) *Ross v. Ever*, 3 Atk. 156.

BOOK III. uary, 1874, will be governed as to the formalities of  
 CHAP. III. execution, by the present law; the new Act being limited  
 Sect. I. in its application to wills made on and after that date.

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## SECTION II.

### *Of Nuncupative Wills.*

1. Definition of Nuncupative Will.
2. Restrictions placed on such wills by the Statute of Frauds.
3. Provisions of Canadian Statute 33 Geo. 3, c. 8.
4. Provisions of the Statute of Frauds as to nuncupative wills condemned by the Real Property Commissioners.
5. Nuncupative wills abolished in England by 1 Vict. c. 26; and in Ontario by Con. Stat. U. C. c. 16, s. 83, except as to soldiers on active service and mariners or seamen at sea.
6. Provisions of "The Wills Act, 1873," regarding nuncupative wills.
7. "Actual military service" means service on an expedition. Wills of soldiers considered.
8. Wills of seamen considered.
9. Will of soldier not revoked by return from expedition.

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1. The law of England formerly permitted the making of wills of personal estate by word of mouth merely. Such wills were called "*Nuncupative Wills*." The definition of Nuncupative Wills, as given in Bacon's Abridgment, is: "Such as are made by word or without writing, which is, when a man is sick, and for fear that death or want of memory or speech should surprise him, that he should be prevented if he staid the writing of his testament, desires his neighbours and friends to bear witness of his last will, and then declares the same presently by word before them; and this being after his death proved by witnesses, and put in writing by the ordinary, is of as great force for any other thing but land, as when at the first in the life of the testator it is put in writing" (a).

(a) Vol. 7, tit. Wills and Testaments, D. p. 305; I. Inst. 3.

the Statute of Frauds placed numerous restrictions on nuncupative wills. It was provided by that Act (a) that a nuncupative will should be good, *where the estate had exceeded the value of thirty pounds*, that was proved by the oaths of three witnesses that were present at the making thereof; nor unless it were proved that the testator, at the time of pronouncing the same, did so in the presence of three persons present, or some of them, bear witness that it was his will, or to that effect; nor unless such nuncupative will were made in the last sickness of the testator; and in the house of his or her habitation or dwelling, or where he or she had been resident for ten years or more, next before the making of such will, except when such person was surprised or taken sick, being from his or her home, and died before he returned to the place of his or her dwelling. It was also enacted by s. 20, that if twelve months passed after the speaking of the pre-testamentary words, no testimony should be received to prove any will nuncupative, except the said words, or the substance thereof, were committed to writing within six days after the making of the said will; and by s. 22 it was enacted, that no will in writing concerning any goods or chattels or personal estate should be made, nor should any clause, devise or bequest therein, be made, altered or changed by any words or will by word of mouth only, except the same were in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him and proved to be his will by three witnesses at the least. It was never provided, that any soldier being in actual military service or any mariner or seaman being at sea (which was then held to apply to seamen on board merchants' vessels),

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might dispose of his moveables, wages, and personal estate, as before the Act.

3. By Statute of Upper Canada 33 Geo. 3, c. 8, nuncupative wills were subjected to further restrictions which must have practically abolished them in this Province. The provisions of this Statute are at present of no importance.

4. Respecting nuncupative wills, the Real Property Commissioners, in their report, made the following observations: "We do not approve of the provisions of the Statute of Frauds respecting nuncupative wills. If it be proper in any case to allow a nuncupative will to be made in a practical manner, the case ought not to depend on the value or nature of the property. It appears to us that the only cases in which there is a good reason for dispensing with the forms generally required for the due execution of a will, are those where a person in his last sickness has not sufficient time and opportunity to make a written will, and to have it duly attested, and where the death of the testator happens unexpectedly from accident or sudden illness in a place where he cannot obtain sufficient assistance to enable him to make a regular will. We admit that, in many of these cases, the impossibility of making a will must be attended with injury to the family of the testator; but, in establishing any general rule, it is impossible to prevent all cases of individual hardship: and, if nuncupative or irregular wills were allowed in such cases, the property of every person who died away from his family would be liable to be fraudulently taken from them by the perjury of persons who were might pretend to have been, near him at the time of death. The temptation to crime, and the loss and deception which might be produced by allowing any exception from the general rule, would probably be f

be greater evils than the disappointment occasioned, in some cases, by the want of means to make a regular will."

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5. Nuncupative wills were accordingly rendered invalid in England by the 9th section of the Statute 1 Vict. c. 26, with the exception of the wills of soldiers and mariners; and by Con. Stat. U. C. c. 16, s. 83, it is provided that "No nuncupative will made after this Act comes in force shall be good,—provided that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate in such manner as he may now do according to the laws of England."

6. "The Wills Act, 1873," provides (a) that no will shall be valid, unless it shall be *in writing*; but it is provided by s. 9 that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act." This Act does not, it will be seen, effect any change in the pre-existing law regarding nuncupative wills.

7. Nuncupative wills are of rare occurrence in this Province. It may, however, be profitable to notice a few points which have been decided respecting the exceptions contained in the Act. The words "actual military service" mean service on an expedition; and an officer or soldier in barracks with his regiment cannot dispose of his property by a nuncupative will (b). But a soldier passing from one regiment to another, both being in active service, may make a nuncupative will (c).

(a) S. 7.

(b) *Drummond v. Parish*, 3 Curt. 522; 7 Jur. 538; *White v. Repton*, 3 Curt. 818; 8 Jur. 562; In the goods of *Pery*, 2 L. T. 335; In the goods

of *Hill*, 1 Rob. 276; In the goods of *Norris*, 3 No. Cas. 197; In the goods of *Thorne*, 4 S. & T. 36.

(c) *Herbert v. Herbert*, D. & Sw. 10; 4 W. R. 182.

BOOK III. 8. A purser (a), or a surgeon in the navy (b), is :  
 CHAP. III. man " within the meaning of the Act. And a wil  
 Sect. II. in a river (not at sea) whilst engaged in an exp  
 against an enemy, is within the Act (c); as is a  
 will of a seaman temporarily on shore, whilst his ve  
 in harbour (d). But the will of an admiral of a  
 station, who lived on shore at the official residence  
 held not to be within the Act, the will having been  
 on shore (e).

9. The will of a soldier, made during actual m  
 service, and not expressly revoked, remains op  
 though the testator remains at home several years  
 date of the will (f). This privilege is more ampl  
 that conceded by the Roman law (g).

### SECTION III.

*Of the mode of making a Will of personal estate, a  
 the requisites to the validity of such a Will.*

1. Wills of personal estate, except nuncupative wills, mus  
 writing, but need not be signed or sealed.
2. Any writing of a testamentary character, which is fi  
 and complete, may be allowed as a good will of pers
3. Instrument without date or signature, and in hand  
 of a stranger, has been allowed as a good will of  
 alty.
4. A will written in pencil is good.
5. There must be *animus testandi*; and therefore if there  
 such *animus*, the paper will be rejected, though co  
 in form.
6. Wills made "in extremis, without due formality, regarde  
 suspicion.

(a) In the goods of *Hayes*, 2 Curt.  
 338.

(b) In the goods of *Saunders*, L.R.  
 1 Prob, 16.

(c) In the goods of *Austen*, 2 Rob.  
 613; 17 Jur. 284.

(d) In the goods of *Lay*, 2 Curt.  
 375.

(e) *Euston v. Seymour*, cit. 2 Curt.  
 329; 3 Curt. 530. See further, as  
 to the wills of seamen, In the goods

of *Milligan*, 2 Rob. 108;  
 1011; In the goods of *Park*  
 & T. 375; 5 Jur. N. S. 553;  
 goods of *Thompson*, 5 No. C.

In the goods of *Corby*, 18 Ju  
 (f) In the goods of *Leese*,  
 216.

(g) Inst. II. tit. XI. S  
 Code Nap. s. 984; *Hayes &*  
*Wills*, 27, n. (m.)



7. **The Courts** inquire into the history and nature of the produced paper.
8. **The burden of proving** an informal or unsigned instrument to be a will, lies upon those who allege it.
9. **Jarman's commentary** upon such instruments.
10. **Principle** that the testamentary intention is the guide, established by the cases.
11. **Effect of a memorandum of attestation** without the signatures of the witnesses.
12. **Opinion of Sir J. Nicholl** in *Beatty v. Beatty*.
13. **If** the completion of the will was prevented by accident, it may be supported.
14. **The result** the same, if the completion is prevented by violence or supervening insanity.
15. **But**, if the incompleteness affects the substance of the paper, it will not be supported as a will.
16. **If** proper excuse is given for delay in completing the instrument, it may be held good.
17. **Instructions for a will** may be a good will.
18. **Exemplification of this rule.**
19. **Exception to this rule.**
20. **Importance of taking instructions in proper form**, for wills of personal estate.  
  - n. (b) Continued importance under "The Wills Act, 1873."
21. **Not necessary** that instructions should be seen by the deceased; but he should be shown to have been acquainted with their contents.
22. **Will dictated in answer to interrogations** valid. Case of *Green v. Skipworth*.
23. **Judgment of Sir J. Nicholl** in that case.
24. **Remarks made** in preceding chapter regarding 1 Vict. c. 26, and its bearing on wills of realty, applicable to wills of personalty, executed under "The Wills Act, 1873."
25. **An entry in an account-book**, duly signed and attested, held testamentary.
26. **Orders on savings banks**, duly signed and attested, held testamentary.
27. **Presumption is against an unfinished paper.**
28. **Presumption is against an unsigned paper** dealing with both real and personal estate.
29. **Rule laid down by Sir E. V. Williams.**
30. **The introduction into a will of a provision**, without instructions, does not make it part of the will.
31. **But if the will was read over to the testator**, such a provision should not be excluded, if he did not object to it.
32. **Mode of executing the will of a married woman**, under Con. Stat. U. C. c. 73.
33. **Will, well executed according to present law must**, after "The Wills Act, 1873," comes into force, be presumed to have been made before 1st January, 1874. This presumption will diminish with the lapse of time.
34. **Rule of Surrogate Court as to the mode of proving a will.**

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1. Subject to the exception treated of in the foregoing section, a will of personal estate in Ontario must be in *writing*. The signature or seal of the testator is not necessary for its validity (a), whether the instrument be the handwriting of the testator, or in another man's hand (b).

2. Any writing of a testamentary character which is finished and complete in itself, and which can be proved to contain the wishes of a testator with regard to the disposition of his personal estate after his death, may be admitted to probate. Thus, a testamentary paper disposing of personal estate in the handwriting of a deceased person, though unsigned by him, may be proved as his will provided it come out of the proper custody, and provided also that the presumption raised in its favour by the handwriting be not rebutted by other suspicious circumstances which would tend to cast doubt on its authenticity (c).

3. An instrument without date and without signature, and in the handwriting of a stranger, has been admitted upon evidence proving beyond doubt that volition accompanied the act, and that there was testamentary intention and sufficient capacity on the part of the deceased (d).

4. A will written in pencil entirely in the handwriting of the deceased, and dated upwards of four years before the death of the testatrix, has been admitted to probate on affidavits of facts showing that she recognized, a short time before her death, such paper as her will (e).

(a) 1 Williams Exors. 66; Godolph. Pt. 1, c. 1, s. 7; *Salmon v. Hays*, 4 Hagg. 382.

(b) 1 Williams Exors. 66.

(c) 1 Williams Exors. 66, and cases in note (i); *Rutherford v. Maule*, 4 Hagg. 213; *Russell v. Marriott*, 1 Curt. 9.

(d) *Friswell v. Moore*, 3 Phill. 135; *Warburton v. Burrows*, 1 A. & E. 383; *Jameson v. Cooke*, 1 Hagg. 38.

(e) In the goods of *Dyer*, 1 Hagg. 219.

5. The *animus testandi* being the point most anxiously inquired into by the Courts, they were not bound to admit to probate an instrument merely because it was regularly signed and attested, and was unaccompanied by fraud or collusion; but where requisite, inquiry was entertained into every attendant circumstance calculated to explain the intention of the deceased with regard to such instrument; and if the conscience of the Court was satisfied, on the production of sufficient evidence, that there really existed no intention to make a testamentary disposition of property by such paper, it was rejected.

6. The Ecclesiastical Courts very properly viewed with the greatest jealousy and circumspection all testamentary acts in the last stage of life unaccompanied with the peculiar forms and observances established by custom and practice. The settled principle of the Courts was, not to pronounce for a disputed paper on proof of handwriting alone, but to require some corroborating circumstances (a).

7. In deciding upon the question of will or no will in a doubtful case, it was their custom to inquire strictly into the history of the produced paper, and the circumstances attending its creation or discovery; to examine whether the disposition made by the paper was a reasonable and proper one, and consisted with the testator's declarations (if he made any) as to his intended disposition of his property, and with the moral obligations imposed upon him (b).

8. And as to any informal or unsigned instrument of this nature, suspicion must necessarily attach, the burden of clearly establishing the instrument or paper to be a will was cast upon him who advanced it as such. A

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(a) *Machon v. Gundon*, 2 Cas. Hagg. 224.  
 temp. Lee, 406; *Crisp v. Walpole*,  
 2 Hagg. 531, and other cases cited; 4 (b) 1 Jarm. Wills, 93.

BOOK III. strong presumption in favour of its validity would arise  
 CHAP. III. from the fact that it was found among the testator's  
 Sect. III. papers, or in his usual place of keeping them ; or from its  
 being produced by some confidential and disinterested  
 friend, to whom the testator had handed it in his lifetime  
 time ; and, on the other hand, should the paper come out  
 of the hands of an unknown and interested person, the  
 Court would be strongly inclined to reject it (a).

9. "Nothing," Mr. Jarman remarks (b), "it is obvious,  
 could be more dangerous than to assume and recognise  
 the validity of a document, thus stamped with every mark  
 of suspicion, on the mere strength of evidence as to the  
 genuineness of the signature of the deceased, seeing with  
 how much skill and success handwriting is frequently  
 imitated ; and this danger, though diminished, is not ex-  
 cluded where the entire will (not the signature only) pur-  
 ports to be in the handwriting of the deceased (c).

10. The principle that the testamentary intention was  
 the chief guide to the Court, was constantly operative in  
 all the decisions. Thus, it was required that the paper  
 submitted as a will should be apparently finished and  
 complete ; for, if it contained in itself evidence of the in-  
 tention of the testator to do some further act before in-  
 tending it to operate as a will, it would be insufficient.  
 Thus, if it appears that the testator intended to subscribe  
 the instrument, and he has not done so, it will not operate  
 as a will, a presumption in such a case arising that the  
 deceased had not fully and definitively resolved on adopt-  
 ing the paper as his will (d).

11. So also if a memorandum of attestation be added,  
 and no witnesses have subscribed their names to the

(a) 1 Jarm. Wills, 93 ; *Rutherford*  
*v. Maule*, 4 Hagg, 213 ; *Russell v.*  
*Marriott*, 1 Curt. 9.

(b) 1 Jarm. Wills, 93.

(c) *Rutherford v. Maule*, 4 Hagg.  
 213.

(d) *Abbott v. Peters*, 4 Hagg. 380.

memorandum, and it be proved that the testator had abundant opportunity of making use of the memorandum, the Court will reject the instrument (a). BOOK III.  
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12. In the case of *Beatty v. Beatty* (b), Sir J. Nicholl said, "As the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed, the presumption of law is *against* a testamentary paper with an attestation clause not subscribed by witnesses." The learned Judge proceeded to observe that "the presumption against an instrument so circumstanced was a slight one, where the instrument, like that before the Court, was perfect in all other respects (c). Slight as it was, however, it must be rebutted by *some* extrinsic evidence of the testator intending the instrument to operate in its subsisting state before it could be admitted to probate" (d).

13. But if it should appear that the formal completion of any unfinished testamentary paper was prevented by accident; if the testator were surprised by sudden weakness, insanity, or debility, or were stricken by the hand of death before he could formally complete the instrument, then the will would be good. Thus, when an attorney had taken down from the deceased's own mouth a statement of his intentions respecting his property, which was read over to and approved by him, and a fair copy directed to be made and brought to him the next morning to be executed as a will, but the testator died in the course of the

(a) *Beatty v. Beatty*, 1 Add. 151; *Walker v. Walker*, 1 Mer. 503; *Harris v. Bedford*, 2 Phillim. 177; *Scott v. Rhodes*, 1 Phillim. 12; *Stewart v. Stewart*, 2 Moo. P. C. 193.

(b) 1 Add. 154.

(c) *Doker v. Goff*, 2 Add. 42.

(d) See also *Montefiore v. Montefiore*, 2 Add. 357, 358; *Bragg v. Dyer*, 3 Hagg. 207; *Forbes v. Gordon*, 3 Phillim. 628; *Coles v. Trecothick*, 9 Ves. 249.

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night, Sir J. Nicholl held this circumstance of the direction to the attorney to make a fair copy and to bring it the next morning for execution, to be conclusive of the testator having fully made up his mind on the subject of his will, and accordingly pronounced in favour of the testamentary paper (a).

14. So where the execution of the will is prevented by the violent interference of those interested in defeating its provisions, or by supervening insanity, it will, nevertheless, be admitted to probate as though it had been executed (b).

15. But the incompleteness must not affect the substance of the will; for if it appeared that the testator only expressed a part of his scheme for the distribution of his property after his death, the Court would not assist in carrying out the expressed part, but would reject the instrument altogether (c).

16. Nor is the indulgence of the Court towards incomplete or unfinished wills limited to those cases in which the defect has arisen from some purely physical obstacle; for if it appears that the testator intended to finish the instrument, and a sufficient excuse is given for delay in its completion, and nothing is shown to induce the belief that the testator had changed his mind with respect to the proposed will, the Court will support it. Thus when a man gave instructions for his will on the 10th December, promising to call at his solicitor's office to execute when prepared, which he never did though he lived until the 15th; but it appeared that the deceased did not

(a) 1 Jarm. Wills, 96; In the goods of Huntington, 2 Phillim. 213. See also Carey v. Askew, 1 Cox, 241; Scott v. Rhodes, 1 Phillim. 20; Masterman v. Maberly, 2 Hagg. 247. (b) L'Huillie v. Wood, 2 Cas. temp. Lee, 22; Lamkin v. Babb, 1

Cas. temp. Lee, 1; Hoby v. 1 Hagg. 146; Fulbeck v. All Hagg. 527. (c) 1 Jarm. Wills, 96; 1 v. Montefiore, 2 Add. 354; Griffin, 4 Ves. 197 n.

he leave his house, the state of his health being such as to render his doing so inconvenient, though not impossible; and as an anxiety expressed to the solicitor to convey the will from his (deceased's) wife supplied a reason for not sending for the will to be executed at home, the court pronounced in favour of the written instructions set down by the solicitor on the oral dictation of the deceased (a).

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(b). Instructions for a will may be as operative as a will (b). Although if a paper be superscribed "Heads of Will," or "Plan of a Will," the inference would be from that that it was intended that a more formal will should be drawn out (c); yet, in a case where such an instrument dated and signed and endorsed "Intended Will," and alterations in it afterwards made in a formal manner, and the deceased declared upon being taken ill "that he had written over the heads of his will and signed it; that it would do very well;" the paper was established as a will (d).

(e). And in another case (e) the question was whether alterations for a will could be held a valid will of person.

The paper was in the handwriting of the deceased, was subscribed by him, and dated 11th of October,

(f). At the commencement it was described to be

*Allen v. Manning*, 2 Add. 490.  
*Re Read v. Phillips*, 2 Phillim.  
*Thomas v. Wall*, 3 Phillim.  
In the goods of *Lamb*, 4 No.  
161.  
*Haberfield v. Browning*, 4 Ves.  
n. 1; 1 Williams Exors. 68, 69;  
*v. Askew*, 2 Bro. C. C. 58; 1  
231; *Goodman v. Goodman*, 2  
temp. Lee, 109; *Robinson v.*  
*Berlayne*, 2 Cas. temp. Lee, 129;  
*v. Malpas*, ibid. 358; *Green v.*  
*Orth*, 1 Phillim. 59; *Wood v.*  
*1*, 1 Phillim. 370; *Huntington*  
*Huntington*, 2 Phillim. 213; *Lang-*  
*v. Lewis*, 2 Phillim. 326; *Sikes*  
*with*, 2 Phillim. 355; *Lewis v.*

*Lewis*, 3 Phillim. 112; *Allen v. Man-*  
*ning*, 2 Add. 490; In the goods of  
*Bathgate*, 1 Hagg. 67; *Burrows v.*  
*Burrows*, 1 Hagg. 109; In the goods  
of *Taylor*, 1 Hagg. 641; *Castle v.*  
*Torre*, 2 Moo. P. C. 133; *Barrow v.*  
*Barrow*, 2 Cas. temp. Lee, 335  
(c) 1 Phillim. 350; see *Hocker v.*  
*Hocker*, 4 Gratt. 277.  
(d) *Bone v. Spear*, 1 Phillim. 345;  
See *Popple v. Cunison*, 1 Add. 377;  
*Barwick v. Mullings*, 2 Hagg. 225;  
*Lillie v. Lillie*, 3 Hagg. 184; 1 Redf.  
Wills, 167, n. 12; 1 Williams Exors.  
103, 104.  
(e) *Torre v. Castle*, 1 Curt. 303.

# OF THE EXECUTION OF WILLS OF PERSONS

Head of instructions to my Solicitor, J. Lee, to add to my will the codicil following." It went on to state what the contents of the codicil were to be. There were initials for several of the legatees, with the words, &c., &c., in many parts of it, but it concluded in these words: "This is my last will and testament; Scarborough," and was indorsed "Mem. to J. Lee—Will—Oct. 11, 1834." Sir H. Jenner Fust pronounced for the validity of this paper and decreed probate thereof, being satisfied by parol evidence and the circumstances of the case, that the deceased intended the paper to have full operation in case anything should happen to him before he had an opportunity of going or before it was convenient for him to go to Mr. Lee for the purpose of having a more formal instrument prepared. And on appeal to the Privy Council the Judicial Committee affirmed this decision (a).

19. But a mere paper of instructions, even though holograph, and signed, cannot be sustained as testamentary, if there was no sudden death or other act of God to prevent the regular execution of the will or codicil by the deceased (b). In cases such as the foregoing, the Court admits parol evidence of the testator's intention as to whether he meant the instrument as memoranda for a future disposition, or to execute it (c).

20. A consideration of the authorities will impress upon the practitioner who is required to make the will of a person labouring under a dangerous illness, the necessity of taking instructions for the will in a careful though concise form. The omission of such a precaution can seldom be justified. By means of such instructions the wishes of

(a) *Castle v. Torre*, 2 Moo. P. C. 133; 1 Redf. Wills, 167, n. 12.  
(b) 1 Williams Exors. 70; *Munro v. Coutts*, 1 Dow. Parl. Cas. 437. See also *Dingle v. Dingle*, 4 Hagg. 388; *Castle v. Torre*, 2 Moo. P. C. 154, 155.

(c) *Mathews v. Warner*, 4 Ves. 186; 5 Ves. 23; *Mitchell v. Mitchell*, 2 Hagg. 74; *Coppin v. Dillon*, 4 Hagg. 361; *Salmon v. Hays*, 4 Hagg. 382; *Castle v. Torre*, 2 Moo. P. C. 154.



the testator may be carried into effect, should his death occur before a regular will can be drawn and executed. These instructions should be signed by the testator, in order to facilitate the obtainment of probate (a); for though unsigned instructions may be admitted to probate as constituting a perfect will of personalty, yet the Court, in such cases, requires strict proof of the intention of the deceased, and to that end will scrupulously sift and examine the evidence by which the paper is supported, and will weigh every adventitious circumstance indicative of testamentary intention. (b)

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21. It does not appear to be absolutely necessary that the instructions should be seen by the deceased or actually read over to him; but when they are not written by himself it must be shown beyond question that he was well acquainted with their contents; that he had dictated them, and that they accorded in every particular with his wishes and intentions.

22. Instructions communicated in answer to interrogatories put by the attorney were in the case of *Green v. Skipworth* (c) admitted to probate. The evidence in this case shewed that the deceased, having been taken suddenly ill, desired the immediate attendance of Mr. Evans, an attorney, to make his will. Evans, immediately on receiving the message, went to the deceased and found him extremely ill, and although of perfect mind, yet unable,

(a) These suggestions were written before the passing of "The Wills Act, 1873." They may be acted upon after the new Act comes into operation, 1st January, 1874; care being taken, however, to have the instructions executed with all the formalities required by the Act. In a late case the Court granted probate of a testamentary paper drawn up in the form of instructions for a will which had been duly executed: In the goods of *Fisher*, 20 L. T. N.

S. 684. But see In the goods of *Pascall*, L. R. 1 Prob. 606; 38 L. J. P. 3; 19 L. T. N. S. 366, as to the sufficiency of the instructions.

(b) *Huntington v. Huntington*, 2 Phillim. 213; *Harris v. Bedford*, 2 Phillim. 177; *Thomas v. Wall*, 3 Phillim. 23; *Burrows v. Burrows*, 1 Hagg. 109; In the goods of *Bathgate*, 1 Hagg. 67; *Russ v. Chester*, 1 Hagg. 227.

(c) 1 Phillim. 59.

BOOK III. from bodily pain, to hold much conversation. The testator himself addressed Evans, saying that he found himself scarcely able to talk. After a short interval Evans, observing that he was again preparing to speak, said that it might save the testator unnecessary exertion, and would probably be the best means of carrying his purpose into effect, if he would allow him to ask a question or two; to which the deceased signified his assent. The medical attendant was in the room, and Evans, in his presence, proceeded by asking the testator whether it was his wish to give any instructions for his will? To which he immediately replied, "I shall leave Mrs. Green all the stocks, effects and improvements; but as to anything else I will speak to you again." Whereupon Evans wrote down the reply with a pencil; and the same having been read over to the testator he signified his approbation of it, and Evans and the medical attendant subscribed their names in pencil. Mr. W., a relation, being in the house, was called into the room, and the clause was again read over to the deceased, and he was asked by Evans if that was what he wished, to which he distinctly answered, "Yes." He was then also asked if he wished to give any further instructions as to farms or otherwise; but appearing to suffer an increase of pain and bodily illness, he replied, "Not at present." This question and reply were written down by Evans, and attested by him and the medical attendant. The several persons then left the room; but shortly afterwards they returned at the desire of the testator, who had somewhat revived. The following question was then put, the same having been first written down with a pencil by Evans—"In case of anything happening to you, who do you wish to have your farms? the Skipworths, Mr. Wilson, or who?" To which he replied, "Mrs. Green;" and the question

being again read over to him, he repeated the same answer. Mrs. Green being requested to withdraw, the question was again put to him in her absence, and he replied in the same manner; whereupon Evans wrote down the reply, and he, together with two other witnesses, subscribed it. Immediately afterwards, his bodily pain much increasing, the deceased was rendered incapable of proceeding in giving further instructions or of executing a more formal will; and he died the following day.

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23. Sir J. Nicholl in delivering judgment made the following observations: "A will made by interrogatories is valid; but undoubtedly whenever a will is so made, the Court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of volition, than it would be in an ordinary case. But if there is clear capacity, if there is the *animus testandi*, and if the intention is or may be reduced into writing, the Court must pronounce for it. It has been observed that the act was rather that of the persons by whom the deceased was surrounded than of the deceased himself. But, under the circumstances, the precautions used were very proper; the exertion of speaking might have been fatal and have prevented him from proceeding to express what his intentions were. The resort, therefore, to question and answer was highly judicious; it was the best practical mode of collecting his wishes and intentions as far as he was capable of expressing them; and was adopted with the consent of the persons present as well as of the testator himself" (a).

24. It has been observed that "The Wills Act, 1873," requires the same formalities of execution, whether the will be a will of realty or of personalty. The remarks upon

12 (a) See also *Martin v. Martin*, Grant, 586.  
Grant, 500; S.C. on appeal, 15

BOOK III. the English Statute 1 Vict. c. 26, contained in the pre-  
 CHAP. III. ceding chapter, and the cases decided upon that Statute,  
 Sect III. will therefore be applicable to wills of personal estate  
 made after the new Act comes into force. No particular  
 form is prescribed by the new Act for the making of a  
 will. In a late case under the English Statute an entry  
 in an account book, containing a full disposition of her  
 property and the appointment of an executor, dated eight  
 months before the death of the testatrix, which was sud-  
 den, and subscribed and carefully preserved, was declared  
 testamentary and probate granted, notwithstanding it  
 contained clear words indicating that it was merely pre-  
 liminary to a final disposition of her estate by will, name-  
 ly, "I intend this as a sketch of my will which I intend  
 making on my return home" (a).

26. And where a testator, being informed that he could  
 not recover from his present illness, signed orders upon two  
 savings banks in favour of his wife, in presence of two  
 witnesses, expressing at the same time a wish that she  
 should, after his death, receive the money in such banks,  
 and he died on the following day, the Court granted ad-  
 ministration to the widow, with the orders annexed, as  
 containing the will of the deceased (b).

27. The presumption is always against a paper which  
 bears self-evident marks of being unfinished; and the  
*onus* of clearly proving that the deceased intended the  
 paper in its actual condition to operate as his will, or that  
 he was prevented by involuntary accident from completing  
 it, is cast upon those who seek to establish it as a will (c).

(a) *Hattat v. Hattat*, 4 Hagg. 211. See also In the goods of *Fisher*, 20 L.T.N.S. 684.

(b) In the goods of *Marsden*, 1 S. & T. 542; 6 Jur. N.S. 405; 2 L. T. N. S. 87.

(c) 1 Jarm. Wills, 98; *Thorn-croft v. Lashmar*, 8 Jur. N.S. 595; 2 S. & T. 479; *Reay v. Couchner*, 1

Hagg. 75; 2 ib. 249; *Wood v. Medley*, 1 ib. 661; In the goods of *Robinson*, ib. 643; *Bragge v. Dyer*, 3 Hagg. 207; *Gillow v. Bourne*, 4 Hagg. 192. As to the contrary presumption in favour of a regularly executed and apparently complete will, *Shadbolt v. Waugh*, 3 Hagg. 570; *Blewitt v. Blewitt*, 4 Hagg. 410.

28. As a will of real estate requires attestation and subscription, the Courts are strongly disinclined to grant probate of unfinished instruments, which profess to dispose of both real and personal estate. The presumption that the testator intended to adopt an unsigned or unwitnessed paper, which deals with realty, is necessarily weak, and if the dispositions of the two species of estate are so blended as to be clearly dependent on each other, the Courts invariably refuse probate. Should the disposition of the personalty be independent of the realty, probate might be granted (a).

29. The rule deducible from the authorities with respect to presumptions concerning imperfect instruments pronounced as wills is thus stated by Sir Edward Vaughan Williams (b). "When there is a mere want of execution of a paper which is complete in other respects, the Court will *presume* the testator's intention to be expressed in such a paper, on its being satisfactorily shown that the non-execution did not arise from abandonment of these intentions so expressed (c). But where a paper is incomplete in the body of it, the Court must be completely satisfied by proof—1st, That the deceased had finally decided to make the disposition of his property expressed in the imperfect paper; 2ndly, that he never abandoned that intention, and was only prevented by the act of God from proceeding to the completion of his will" (d). "It is now clearly settled," said Sir John Nicholl, in *Johnston v. Johnston* (e), "that in respect to an unfinished paper, enough followed by sudden death, the interval must be accounted for; and it must be *shown* that the testator

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(a) 1 Williams Exors. 68; In the case of *Herne*, 1 Hagg. 226; *Douglas v. Smith*, 3 Knapp, 1; *Eldon v. Eldon*, 4 Hagg. 183; *Gillow v. Herne*, 4 Hagg. 291; *Tudor v. Tudor*, Hagg. 199, note (a).

(b) 1 Williams Exors. 71, 72.

(c) 2 Add. 358.

(d) *Devereux v. Bullock*, 1 Phillim. 73.

(e) 1 Phillim. 495.

BOOK III. *adhered to the intention*, but was prevented from finishing  
 CHAP. III. it (a).

SECT. III. 30. The introduction, whether accidental or not (b), into a will of any provision without instructions from the testator and without his knowledge does not make it a part of the will, even though he should execute the will; and probate will be granted omitting such provisions (c).

31. But if the will were read over to the testator before execution, a clause cannot be excluded from probate even though inserted by inadvertence (d). In a very recent case (e) an important word was through error introduced by a solicitor's clerk into a residuary bequest, the effect of which was to limit the bequest, which was intended to be general, to real estate only. The Court, whilst admitting that the evidence of the error was clear, stated that since "The Wills Act," 1 Vict. c. 26, the Court had no power to supply words accidentally omitted from a will; and, on the other hand, it could only omit words from the probate which had been inserted by fraud or mistake, without the knowledge of the testator. That the remedy asked for in the case before the Court was not to reject words of which the testator was ignorant, but to modify the language used by the draftsman and adopted

(a) *Castle v. Torre*, 2 Moo. P. C. 156; per Bosanquet, J. . Accord. See *Fulleck v. Allinson*, 3 Hagg. 527, as to the validity of a will as an unexecuted paper in a case where insanity supervenes between the preparation and the execution. See further on this subject, *Brown v. Hallett*, 2 Cas. temp. Lee, 418; *Griffin v. Griffin*, 4 Ves. 197; note to *Mathews v. Warner*; *Sandford v. Vaughan*, 1 Phillim. 48; *Devereux v. Bullock*, 1 Phillim. 60; *Musto v. Sutcliffe*, 3 Phillim. 104; *Bayle v. Mayne*, 3 Phillim. 504; *Forbes v. Gordon*, 3 Phillim. 614; *Rouse v. Mouldale*, 1 Add. 129; *Lord Thynne v. Stanhope*, 1 Add. 52; *Antrobus v. Nepean*, 1 Add. 399; *Montefiore v. Montefiore*, 2 Add. 354; *Jameson v. Cooke*, 1

Hagg. 82; *Cundy v. Medley*, 1 Hagg. 140; *Ibid.* 661; *Ibid.* 671; In the goods of *Herne*, 1 Hagg. 222; In the goods of *Broderip*, 1 Hagg. 385; In the goods of *Wenlock*, 1 Hagg. 551; In the goods of *Robinson*, 1 Hagg. 643; *Reay v. Couches*, 2 Hagg. 249; *Theakston v. Marson*, 4 Hagg. 236; *Castle v. Torre*, 2 Moo. P. C. 153.

(b) *Allen v. McPherson*, 1 H. L. C. 191.

(c) In the goods of *Duane*, 2 S. & T. 590; 8 Jur. N. S. 752; 31 L. J. P. 173; 6 L. T. N. S. 788; In the goods of *McCabe*, 2 S. & T. 474.

(d) *Guardhouse v. Blackburn*, L.R. 1 Prob. 109.

(e) *Harter v. Harter*, L. R. 3 Prob. 11.

by the testator, so as to make it express the supposed intention of the testator. The opinion of the Court was that the error which had undoubtedly crept into the will, whether it were one of omission or insertion, was equally beyond the jurisdiction of the Court to correct.

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32. The will of a married woman, made under the provisions of s. 16 of Con. Stat. U. C. c. 73, must be executed in the presence of two or more witnesses, neither of whom is her husband. The question arises under the statute must the witnesses subscribe a will of personalty? The reasons which have been assigned for holding that they must subscribe a will of realty made under the Act, do not apply to wills of personalty, inasmuch as the latter do not ordinarily require attestation. It is conceived that it is not absolutely necessary under the Act that the witnesses should subscribe.

33. Cases will no doubt occur after "The Wills Act, 1873," becomes operative, in which, from the absence of a date and all other information, it will be impossible to ascertain when a will was made; whether before or after the new Act came into operation. The same difficulty occurred in England after the passing of the Statute 1 Vict. c. 26. It was there held that, as every one is presumed to know the law, a will without any date, well executed according to the old law, but not executed pursuant to the new Act, should be presumed to have been executed before the new Act came into operation; but that the strength of this presumption should diminish, as the period increases during which the new Act has been in force (a).

34. It is provided by Rule 7 of our Surrogate Court

(a) *Peckell v. Jenkinson*, 2 Curt. 273. It might be as well to limit a period, by legislative enactment, beyond which this presumption should not operate.

BOOK III. Rules, that where there are one or more subscribing witnesses to a will or codicil, the due execution of such will  
CHAP. III. or codicil shall be sworn to by any one of such witnesses,  
Sect. III. or the absence of such witnesses accounted for ; in which last case, such will or codicil must be established by other proof to the satisfaction of the judge. This rule will, of course, if allowed to remain in force, apply to wills executed under the provisions of "The Wills Act, 1873."



## CHAPTER IV.

### OF THE INCORPORATION INTO A WILL BY REFERENCE OF UNEXECUTED PAPERS.

1. The law permits the incorporation into a will of papers therein referred to, subject to certain conditions.
2. The doctrine laid down in *Habergham v. Vincent*.
3. Limitation of the doctrine. The paper must be referred to as being in existence.
4. Statement of the law by Sir C. Cresswell in *Straubenzie v. Monk*.
5. And by Sir J. P. Wilde in the goods of *Sunderland*.
6. Case where reference insufficient.  
n. Recent case of *Anderson v. Anderson*.
7. Reference to a paper as not in existence, or "to be made" insufficient.
8. Paper must be so referred to as to be capable of being clearly identified.
9. Case of *Straubenzie v. Monk*.
10. Case of In the goods of *Gill*.  
n. () Case of *Dickinson v. Stidolph*.
11. Case of In the goods of *Mercer*.  
n. () Various cases remarked upon.
12. Paper to be incorporated should be described in the will.
13. Question how far parol evidence is admissible to assist in identification considered. Case of In the goods of *Sunderland*.
14. Paper written after the will may be incorporated where the will is republished by a codicil.
15. Case of In the goods of *Truro* considered.
16. Question when papers referred to should be included in probate considered. Dr. Lushington's opinion.
17. Deposit of a deed of settlement may be dispensed with. A notarial copy should be deposited.
18. A testator cannot create a power to dispose by a future unattested codicil.

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1. It frequently happens that a testator in his will refers to another paper or document, in such a manner as to render it impossible, without a reference to such paper or document, to ascertain the testator's intention. Subject to certain restrictions, the law permits of the incorporation

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BOOK III. into the will of the paper referred to, so as to make it
CHAP. IV. part of the will (a).

2. The doctrine in question is thus laid down by Mr. Justice Wilson in an important case (b): "I believe it is true, and I have found no case to the contrary, that if a testator in his will refers to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it. But the difference between that case and a relation to a future intention is striking. In the former there is a precise intention mentioned at the time of making the will, as the paper makes out the intention at the time" (c).

3. The authorities show that the doctrine in question is subject to certain limitations. It is, in the first place, necessary that the paper referred to should not only be in existence when the will is made, but should be referred to by the will as being in existence.

4. In *Straubenzie v. Monk* (d), Sir C. Cresswell said: "The judgment in *Allen v. Maddock* (e) points out the conclusion at which I ought to arrive. It adopts the opinion of Lord Eldon in *Smart v. Prujean* (f), that a testamentary paper duly executed, in order to incorporate another, must refer to it as a written document then existing in such terms that it may be ascertained."

5. And Sir J. P. Wilde, In the goods of *Sunderland* (g),

(a) *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J. P. 49; 8 Jur. N. S. 391; 5 L. T. N. S. 719; In the goods of *McCabe*, 2 S. T. 474; 31 L. J. P. 190; 6 L. T. N. S. 474.

(b) *Habergham v. Vincent*, 2 Ves. 204, 228.

(c) See also *Molineux v. Molineux*, Cro. Jac. 144.

(d) 3 S. & T. at p. 12; 8 Jur. N. S. 1169; 32 L. J. P. 21.

(e) 11 Moo. P. C. at p. 464.

(f) 6 Ves. 565.

(g) L. R. 1 Prob. at p. 199; 35 L. J. P. 82; 14 L. T. N. S. 741.

after quoting the language of Sir C. Cresswell, says, "On the authority of these cases I hold, that in order to let in parol evidence to ascertain the truth, as far as it can be ascertained by such evidence, with regard to an unexecuted testamentary document, the passage in the will by which reference is made to it must describe it as a document then existing." BOOK III.
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6. Where the will contained a reference to executors 'hereinafter named,' but did not appoint executors, and a clause appointing executors was written underneath the testator's signature, it was held that the reference in the will was not such a reference to the clause appointing executors as a document in existence at the time of the execution, as to incorporate it, or to justify the Court in receiving parol evidence that it was written before the will was signed (a).

7. In a case where the will referred to a paper as not then existing, the Court refused to incorporate the paper with the will, although the paper and the will were written on the same day (b). The circumstance that the paper is described in the will as "made or to be made," is a strong ground for considering that it was not then in

(a) In the goods of *Dallow*, L. R. 1 Prob. 189; 31 L. J. P. 128. (The same rule has been acted upon in a number of reported cases. See *Allen v. Maddock*, 11 Moo. P. C. 427, in which the earlier cases are reviewed. In the goods of *Watkins*, L. R. 1 Prob. 19; 12 Jur. N. S. 12; 35 L. J. P. 14; 13 L. T. N. S. 445. In the goods of *Reid*, 19 L. T. N. S. 265; 38 L. J. P. 1. In the recent case of *Anderson v. Anderson*, L. R. 13 Eq. 381, where the question was, whether a duly executed codicil was a republication and incorporation of a will, so as to validate a bequest contained in the will in favour of the husband of one of the wit-

nesses, it was argued that inasmuch as the codicil referred to the instrument previously executed as a will, when, so far as the bequest in question was concerned, it was not a will, there was no sufficient reference in the codicil to the will to incorporate it, and render valid the void bequest. The Court, however, on the authority of *Allen v. Maddock* (sup.), held otherwise, and considered that the bequest was made good by the codicil. See in the goods of *Widdrington*, 35 L. J. P. 66; 14 L. T. N. S. 369.

(b) In the goods of *Sims*, 16 W. R. 407; 17 L. T. N. S. 619.

BOOK III. existence; and, therefore, that it is not duly incor-
 CHAP. IV. rated(a).

8. It is also a condition of incorporation, that the pa-
 to be incorporated should be so referred to by the wil-
 with the aid of parol evidence when necessary and
 perly admissible, to leave no doubt of its identity.

9. Thus, in a late case (b), a testatrix enclosed and sealed
 up in an envelope two sheets of paper on which she had writ-
 ten an expression of her wishes in regard to the disposition
 of her estate. The papers were not duly executed, but the
 testatrix wrote on the inside of the envelope, "It is my
 wish for my husband to administer the moneys, and for
 the smaller bequests, B. will attend to them," which me-
 morandum was signed by her and attested by two wit-
 nesses. The only surviving witness deposed that, after
 the execution of this memorandum, two sheets of paper,
 similar to those found in the envelope, were placed therein,
 and sealed up by the testatrix; but she could not further
 identify them, the envelope having been opened after the
 execution. It was held that, as the words in the memo-
 randum did not refer to any papers as then existing, or, if
 so, not in such terms as to enable the Court to identify
 them; and as the evidence did not show that the papers
 found in the envelope were the same as were placed
 therein at the time of the execution of the memorandum,
 the papers were not so far identified as those referred to in
 the memorandum, and as being in existence when the me-
 morandum was made, as to be entitled to probate, and that,
 without them, the memorandum was not testamentary.

(a) In the goods of *Skair*, 5 No.
 Cas. 57; In the goods of *Astell*, ib.
 489 n; In the goods of *Hakewell*, 1
 Deane, 14; 2 Jur. N. S. 168; In
 the goods of *Countess of Pembroke*, 1
 S. & T. 250; 1 Deane, 182; 2 Jur.
 N. S. 526.

(b) *Straubenzie v. Monk*, 8 Jur.
 N. S. 1159; 32 L. J. P. 21; 3 S.
 & T. 6. But see In the goods of
Almosmino, 1 S. & T. 508; 6 Jur.
 N. S. 302; 29 L. J. P. 46.

So where the deceased, in 1866, executed a will, few days afterwards a paper which he called "di-ns" to his executors, to form part of his will; and in he executed a new will, revoking all former wills odicils; and in the last will he expressed a wish certain goods and chattels should be disposed of ling to the written directions left by him and affixed will: but no paper was found affixed to his will; he codicil above mentioned, which, in many respects, red to the written directions described in the will, ound in the testator's private room, the Court re-to include the codicil in the probate, holding that not sufficiently identified (*a*).

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Where the deceased executed a will in India, which eposited in a bank in that country, and subsequently gland, he executed a codicil to the will, which conl the following clause: "Of which will, I, along with odicil thereto, execute a copy and homologate and m the same in all particulars, except in so far as al-or confirmed by this codicil;" and, at the time of the tion of the codicil, the deceased produced a paper, he informed the witnesses was a copy of the will;

n the goods of *Gill*, L. R. 6; 39 L. J. P. 5; 21 L. T. 99. See also In the goods of 3 S. & T. 167; 33 L. J. 9 Jur. N. S. 581; In the f *Brewis*, 10 Jur. N. S. 593; l. P. 124; 3 S. & T. 473; goods of *Whatman*, 10 Jur. N. ; 34 L. J. P. 17; *Longstaff* ison, 1 Drew, 28; In the f *Drummond*, 2 S. & T. 8; l. 476; *Marsh v. Marsh*, 1 S. 8; 6 Jur. N. S. 380; 30 L. 7; *Allen v. Maddock*, 11 Moo. 27; In the goods of *Greeves*, l. 250; 28 L. J. P. 18; In ds of *Luke*, 11 Jur. N. S. t L. J. P. 105; *Dillon v.*

Harris, 4 Bligh, N. S. 329. When a codicil refers to two memorandums, and only one is found, effect must be given to that which is found; for either the ordinary presumption must prevail, that the missing paper was destroyed by the testator *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because he made other dispositions of his property, which are unknown, by reason of the testamentary paper which contained them not being forthcoming. *Dickinson v. Stidolph*, 11 C. B. N. S. 341. ¶ —

BOOK III. it was held that the copy so produced was incorporated
CHAP. IV. into the codicil (a).

12. It is commonly required for the purpose of identification, that the substance of the paper to be incorporated should be so far described in the will as to make it intelligible, without relying upon the paper for any material matter of substance (b), or that the paper should have been shown to some one before the execution of the will; or else a memorandum be endorsed by the testator upon the paper as "this is the paper referred to in my will," or some similar memorandum; and this should be shown to have been made before the execution of the will (c).

(a) In the goods of *Mercer*, L. R. 2 Prob. 91; 39 L. J. P. 43; 23 L. T. N. S. 195. The words "ratify and confirm," used by a testator in his will, are sufficient to render a deed of settlement to which they are applied part of the will.—*Sheldon v. Sheldon*, 1 Rob. 81; 8 Jur. 877. See also *Stump v. Gaby*, 2 D. M. & G. 623; and it is unimportant that the incorporated document is voidable (*Stump v. Gaby*, sup.) or invalid: In the goods of *Smart*, 4 No. Cas. 39; *Sweet v. Bidsley*, 6 No. Cas. 189; In the goods of *Willcsford*, 3 Curt. 77; In the goods of *Hunt*, 2 Rob. 622; 17 Jur. 720. In the goods of *Bosanquet* (14 Jur. 964), an unattested document, purporting to exercise a power of appointment, was held to be incorporated with a will; and in the case, In the goods of *Countess of Durham* (3 Curt. 57), the revoked will of another person, and In the goods of *Hally*, 5 No. Cas. 510, a letter, were respectively held to be well incorporated with, and to form part of the will in which they were referred to. See also In the goods of *Willmott*, 1 S. & T. 36. But a deed referred to as "made" by the testator, but in fact not executed by him, was held not to be incorporated with his will: In the goods of *Edwards*, 6 No. Cas. 306; and alterations unaccounted for in a duly identified and incorporated document, were excluded from probate: *Sweet v. Bidsley*, 6 No. Cas. 189; In the goods of

Bacon, 3 No. Cas. 645, a schedule of books, and In the goods of *Ad. D. & Sw. 181*, a list of plate, written on the same sheets as the will, were respectively held to be well incorporated. But see In the goods of *Warner*, 10 W. R. 566. See the following cases, in which the identity was held to be insufficiently shown, and the instruments intended to be referred to, were not made parts of the respective wills:—*Collier v. Langebear*, 1 No. Cas. 369; In the goods of *Astell*, 5 No. Cas. 489 n.; In the goods of *Baldwin*, 5 No. Cas. 293; In the goods of *Skair*, 5 No. Cas. 57; In the goods of *Hakewell*, D. & Sw. 14; 4 W. R. 304; In the goods of *Sotherton*, 2 Curt. 831; In the goods of *The Countess of Pembroke*, D. & Sw. 182; In the goods of *Lancaster*, 29 L. J. P. 155; In the goods of *Drummond*, 2 S. & T. 8; 8 W. R. 476.

(b) See in the goods of *Gress*, 1 S. & T. 250; 28 L. J. P. 18.

(c) 1 Jarm. Wills, 84; 1 Bell. Wills, 261-262; In the goods of *The Countess of Durham*, 3 Curt. 57; 6 Jur. 176; In the goods of *Pestner*, 4 No. Cas. 479; In the goods of *Dickens*, 3 Curt. 60; In the goods of *Willesford*, 3 Curt. 77; In the goods of *Norris*, 14 W. R. 348; In the goods of *Darby*, 4 No. Cas. 427; 10 Jur. 164; *Jordan v. Jordan*, 2 No. Cas. 388; In the goods of *Bacon*, 3 No. Cas. 644.

3. In the goods of *Sunderland* (a), the Court had occasion to consider the question, how far parol evidence could be admitted to assist in the identification of the paper referred to in the will. The testatrix had, by her will, bequeathed the residue of her property "save and except such articles of furniture as shall be ticketed or described in a paper in my own handwriting, to show my intention regarding the same." When she instructed her attorney to draw the will, she produced to him two lists which she said was the paper she intended to refer to. At the time when the will was executed, they were not shown to the attesting witnesses; but at a time when a second codicil to the will was executed, they were seen by the witnesses; but the testatrix did not make any verbal reference to them. Sir J. P. Wilde in his judgment remarked, "If the Court were at liberty to turn to independent sources of information, and investigate the question whether she intended those papers to form part of her will, independently of the language in which she is expressed to have referred to them, there is abundant parol evidence to satisfy the Court that the testatrix intended these lists to form part of her will. But, after consideration, I am of opinion that the Court is not at liberty to enter into that question, and to receive that parol evidence. The Court cannot properly go further in that direction than the limit fixed by the Judicial Committee of the Privy Council in *Allen v. Maddock* (b). That limit seems to be fixed by one sentence in the judgment. A reference in a will may be in such terms as to exclude parol testimony, as, where it is to papers not yet written, where the description is so vague as to be incapable of being applied to any instrument in particular; but the

BOOK III.

CHAP. IV.

(a) L. R. 1 Prob. 198; 35 L. J. 12: 14 L. T. N. S. 741; (b) 11 Moo. P.C. at p. 454.

BOOK III. authorities seem clearly to establish, that where there is
 CHAP. IV. a reference to any written document described as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it. "There must be a reference to a written document described as then existing."

14. A paper, written after the will, may be regarded as incorporated into it, where the will is republished by a codicil, executed after the execution of the paper (a).

15. In a late case (b), Sir J. P. Wilde, after carefully reviewing the cases, stated the rule to be: "That where the will, if treated as executed at the date of the codicil, and as speaking at that date, contains language which, within the principle of *Allen v. Maddock* (c), would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document; but when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date.

16. The question when incorporated papers are to be included in the probate was considered by Dr. Lushington in the case of *Sheldon v. Sheldon* (d). He distinguishes between a *necessity* and a *title or option* in such cases. "The *title* to probate," he remarks, "depends upon the clearness and sufficiency of the words of incorporation; the necessity of taking probate will depend

(a) 1 Redf. Wills, 262-263; In the goods of *Hunt*, 2 Rob. 622; 17 Jur. 720; In the goods of *Stewart*, 3 S. & T. 192; S.C. 4 S. & T. 211; 9 Jur. N. S. 417; 32 L.J.P. 94; *Sheldon v. Sheldon*, 1 Rob. 81; 8 Jur. 877; In the goods of *Mathias*, 3 S.

& T. 100; 9 Jur. N.S. 630; 32 L.J. P. 115; 8 L.T.N.S. 471.

(b) 11 Moo. P.C. 427.

(c) In the goods of *Truro*, L. R. 1 Prob. at p. 205; 35 L.J.P. 89; 14 L.T.N.S. 893.

(d) 1 Rob. 81; 8 Jur. 877.

upon the validity or invalidity of the instrument to be incorporated. For instance, if a man by will or codicil simply ratifies a deed valid *per se*, no one would be compelled to take probate of that deed, but the title to probate remains the same; if he ratifies an instrument invalid or inoperative *per se*, then the *title* and *necessity* co-exist. If a party refers to a valid deed, and directs that his property shall be settled on similar trusts, then there is a *title* to probate, and if there be litigation there is also necessity; *for I have yet to learn how a Court of Law could give effect to such will, unless the instrument referred to formed part of the probate.*"

BOOK III.
CHAP. IV.

17. Strictly, all papers entitled to probate ought to receive probate; but in the case of a will referring to and incorporating a deed in the possession of persons (trustees for example) who will not give up the deed, probate may be passed of the will alone, without a deposit of the original deed (a). In England, a notarial copy, if obtainable, is deposited in the registry, and a similar copy is made part of the probate (b).

18. The decisions which have been referred to, it is obvious, create a marked distinction between cases in which there is a reference to an existing paper, and cases in which a testator attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. "To allow such a codicil," observes Mr. Jarman (c), "to be supplementary to the contents of the will itself, would, it is obvious, tend to introduce all the evils against which

(a) In the goods of *Lansdowne*, 3 S. & T. 194; 32 L.J.P. 121; 9 L.T.N.S. 22; In the goods of *Dundas*, 9 Jur. N.S. 360; 32 L.J.P. 165; 12 W.R. 18; In the goods of *Garbett*, 22 L.T.N.S. 366; *Sheldon v. Sheldon* 1 Rob. 88; 8 Jur. 877; In the goods of *Batterbee*, 2 Rob. 439; In the goods of *Sibthorp*, L.R. 1 Prob. 106;

35 L.J.P. 73; 13 L.T.N.S. 803.

(b) In the goods of *Dickens*, 3 Curt. 61; In the goods of the *Countess of Limerick*, 2 Rob. 313, probate was granted of a will with extracts from a document referred to, but not recited in the will.

(c) 1 Jarm. Wills, 86.

BOOK III. the Statute of Frauds was directed, and, indeed, give to
CHAP. IV. the will an operation in the testator's lifetime, contrary to
the fundamental law of the instrument." It has been
held, accordingly, in several cases, that the attempt to
create such a power in the manner indicated is ineffec-
tual (a)."

(a) See the cases referred to in 1 Jarm. Wills, 87 *et seq.*

CHAPTER V.

THE TESTATOR'S KNOWLEDGE OF THE CONTENTS OF HIS WILL.

- A** testator must know the contents of his will. He cannot adopt a paper as a will, if he is ignorant of its contents.
- W**hen a person benefited draws the will, the proof of knowledge of contents by the testator must be clear.
- I**t is not necessary to prove that the will was actually read over to the testator, but if testator was blind or incapable of reading, proof is required that he knew the contents of the will.
- R**ule, as stated by Dr. Lushington.
- I**f testator shown to be of sound mind, it is presumed that he knew and approved of the contents of the will.
- R**ules laid down by Sir J. P. Wilde in *Guardhouse v. Blackburn*.
- P**roof of signature only required.
- C**ase of *Morrit v. Douglass*.
- P**resumption that testator knew the contents of will may be displaced by evidence.
- C**lause introduced into a will by fraud or mistake does not become part of the will.
- B**ut if the will has been read over to the testator, an error in it cannot be corrected.
- R**ecent case of *Harter v. Harter*. Opinion of the court as to its power to correct a will under the new statute.
- (a)** This case an authority upon "The Wills Act, 1873." Judgment of the Court as to its power to correct a will.

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1. It is essential to the validity of a will that the testator should know and approve of its contents. If a man should sign a paper, of the contents of which he knows nothing, such a paper could not be proved as a will. And testator has not even the power to adopt a will made by another person for him, without making himself acquainted with its contents (a).

2. The fact that the person who is benefited by a will, has also drawn it or procured it to be drawn, is, as we

BOOK III.

CHAP. V.

(a) *Hastlow v. Stobie*, L. R. 1 Prob. 64; 35 L. J. P. 18.

BOOK III. have seen, a very suspicious circumstance, and, if it should  
 CHAP. V. appear that the testator had not a full and perfect knowledge of the contents of the instrument, it will be set aside as having been improperly procured (a).

3. In *Harrison v. Rowan* (b), Washington, J. said: "It is not necessary in order to establish the will, that the person claiming under it should prove that it was read over to the testator in the presence of the attesting and other witnesses (c); the law presumes, in general, that the will was read over by or to the testator. But if evidence be given that the testator was blind, or from any cause incapable of reading; or if a reasonable ground is laid for believing that it was not read to him, or that there was fraud or imposition of any kind practised on the testator, it is incumbent on those who would support the will to meet such proof by evidence, and to satisfy the jury either that the will was read, or that the contents were known to the testator.

4. The rule upon the subject of knowledge by the testator of the contents of the will is thus stated by Dr. Lushington (d): "The doctrine is, that proof of the knowledge of the contents may be given in any form, but the degree of proof depends upon the circumstances of each case—that, in perfect capacity, knowledge of contents may be presumed,—but that, when the capacity is weakened, and the benefit to the drawer of the will is large, the presumption is weaker, the suspicion is stronger. The proof must be more stringent, and the Court must be satisfied of the knowledge of the contents beyond the proof of execution by the testator. I must add another consideration—the nature of the instrument executed—its sim-

(a) See the cases cited under the head of undue influence.

(c) See *Mitchell v. Thomas*, 6 Moo. P. C. 137; 12 Jur. 967.

(b) 3 Wash. C. C. 580, 584, 585.

(d) *Durnell v. Corfield*, 1 Rob. 51 63.

city or complexity. I have always understood the doctrine to be, that in case of suspicion (which depends on all the circumstances of the case), the proof is to be proportion to the degree of suspicion; but it may be truly said, the greater the loss of capacity, the more stringent is the necessity for adequate proof of knowledge of contents (a)."

BOOK III.

CHAP. V.

5. If, in propounding a will, it is shown that the testator was of sound mind, that he read the will, or that it was read to him, and that he signed it, the presumption is that he knew and approved of the contents of every part of it (b). And such evidence has, in the absence of proof to the contrary, been held almost conclusive that the testator knew and approved of the contents of the will (c).

6. In *Guardhouse v. Blackburn* (d), Sir J. P. Wilde laid down the following important rules regarding wills duly executed.

*First*, Before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved the contents at the time he signed it.

*Secondly*, That except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents.

*Thirdly*, That although the testator knew and approved the contents, the paper may still be rejected on proof establishing beyond all possibility of mistake, that he did not intend the paper to operate as his will.

*Fourthly*, That although the testator did know and

a) See also *Barry v. Butlin*, 1 M. & C. 637; 2 Moo. P. C. 480; *Cleare v. Cleare*, L. R. 1 Prob. 655; 38 L. J. P. 81; 20 L. T. N. S. 497.

b) *Atter v. Atkinson*, L. R. 1 Prob. 665; 20 L. T. N. S. 404; *Ware v. Cleare*, L. R. 1 Prob. 655;

38 L. J. P. 81; 20 L. T. N. S. 497; *Sutton v. Sadler*, 3 C. B. N. S. 87; 3 Jur. N. S. 1150; 26 L. J. C. P. 284.

(c) *Guardhouse v. Blackburn*, L. R. 1 Prob. 109; 12 Jur. N. S. 278; 35 L. J. P. 116; 14 L. T. N. S. 69.

(d) *Sup.*

BOOK III. approve the contents, the paper may be refused probate,  
 CHAP. V. if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof.

*Fifthly*, That, subject to the last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of the execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved, as well as knew the contents thereof.

*Sixthly*, That the above rules apply equally to a portion of the will as to the whole. The learned Judge referred to *Barry v. Butlin* (a) and *Allen v. McPherson* (b) as supporting the propositions laid down by him (c)

7. In a case where the testator had signed his will by putting his mark to it, it was held unnecessary to give further proof than the proof of signature. And an objection to the will on the ground that evidence had not been produced that the will had been read over to the testator before execution, was overruled (d).

8. Where, however, it appeared in evidence that a mark had been made to the will before the witnesses were introduced, and they saw the mark, and one Davis who was present said to them that he wished them to sign Thomas Morrit's will, and Morrit sat by without making any remark, and nothing more was said, and the will was not read over in the presence of the witnesses, one of whom deposed that he thought the deceased was not exactly in

(a) 2 Moo. P. C. C. 480.

(b) 1 H. L. C. 191.

(c) See the recent case of *Goodacre v. Smith*, L. R. 1 Prob. 359; 36 L. J. P. 43; 15 L. T. N. S. 511. in which the will was upheld, though made in favour of strangers in blood, and though the instructions were given in presence only of those inter-

ested under the will, and though the will was not read over or its contents explained at or before the execution, it being shown that the will was in accordance with previously expressed intentions.

(d) *Clarke v. Clarke*, 2 Ir. C. L. R. 385, Q. B.

his right mind at the time; the Court refused to admit the will to probate, Sir James Hannen observing that the evidence entirely failed to satisfy him that the deceased knew what the contents of the alleged will were (a).

BOOK III.

CHAP. V.

9. The presumption that the testator knew the contents of his will may be displaced by evidence that such was not the case; and, therefore, where the sole executor of a prior will pleaded to a declaration propounding a subsequent will, that the deceased, at the time he signed the subsequent will, did not know and approve of its contents, a demurrer to the plea was overruled (b).

10. Where a clause is introduced into a will by fraud (c), or *per incuriam*, the testator not having given instructions for, and being ignorant of the existence of such clause (d), it forms no part of the will of the testator, and probate will be granted of the remainder of the will.

11. On the other hand, a testator having erased a clause in his will after execution, asked a friend to make a fresh copy of it, omitting the erased clause. The copy was made, but the person who made it, by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both wills having remained in his custody up to that time. The two wills not being inconsistent with each other, and the latter containing no express clause of revocation, the Court granted probate of both documents, upon parol evidence of the circumstances under which they were drawn up and executed, as together constituting the deceased's last will and testament (e).

(a) *Morrit v. Douglas*, L. R. 3 Prob. 1.

(b) *Hastilow v. Stobie*, L. R. 1 Prob. 64; 35 L. J. P. 18.

(c) *Allen v. McPherson*, 1 H. L. C. 191.

(d) In the goods of *Duane*, 2 S. & T. 590; 8 Jur. N. S. 752; 31 L. J. P. 173; 6 L. T. N. S. 788.

(e) *Birks v. Birks*, 4 S. & T. 23; 34 L. J. P. 90; 13 L. T. N. S. 193.

# OF THE EXECUTION OF WILLS.

12. In an important case (a) which lately came before the Court of Probate in England, the Court had occasion to consider the question how far it was competent for the

(a) *Harter v. Harter*, L. R. 3 Prob. 11. In this case, Sir J. Hannen thus laid down the law: "I think it is not in the power of the Court to supply words accidentally omitted from a will. The Wills Act (1 Vict. c. 26, s. 9) admits of no qualification. 'No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned.' that is, by a duly attested signature. In the present case there is no testamentary disposition of the residue of the personality of the deceased fulfilling the requirements of the Act, and the intention of the deceased, however clearly it may appear in the unattested instructions, cannot be given effect to. 'With respect to wills made on or after January, 1838,' says Sir E. V. Williams (1 Williams Exors. 345), 'it is plain that by reason of the provisions of the statute 1 Vict. c. 26, the whole of every testamentary disposition must be in writing, and attested pursuant to the Act. Whence it follows that the instructions has no power to correct omissions or mistakes by reference to which that statute extends.' This disposes of the numerous cases which were cited in argument, of dates anterior to 1 Vict. c. 26; and with regard to wills to which that statute is applicable, it has not been suggested that the Court can admit in some duly attested document, words not contained in the document, however cogent the evidence may be, from oral or written instructions, that they were intended to be part of the will. But it was contended on behalf of the plaintiffs that the true view of the nature of the mistake in the draft and copy as executed is not that the words 'and personal' were omitted, but that the word 'real' was inserted, and that the will ought to be made to read, 'all the residue and remainder of my estate.' I have already stated my grounds for holding that the error was one of omission, but there are further special reasons why I cannot expunge the word 'real' from the residuary clause. There are, undoubtedly, numerous cases which establish that this Court may decree probate of a part only of a properly attested instrument purporting to be a will. It is not necessary to do more than refer to the authorities collected in the case of *Fawcett v. Jones*, 3 Phillim. 434, which, though relating to wills before the statute 1 Vict. c. 26, are on this head applicable to wills of later date. And in the case of *Allen v. McPherson*, 1 H. L. C., at p. 207, Lord Lyndhurst said, 'It is perfectly clear that the Ecclesiastical Court may admit part of an instrument to probate, and refuse it as the rest.' Lord Campbell, 1 H. C., at p. 233, in the same case, said, 'It is quite clear that the Ecclesiastical Court had jurisdiction to refuse probate of that part of a codicil which affects the testament, because, giving credit to the stated, that part of the codicil not the will of the testator; was imposed upon, and probate of that part of the codicil ought to have been refused.' In that case, fraud was sought to expunge a part of a codicil; but, in the goods of *Dudne*, 2 S. & T. 590, Sir C. Cresswell applied the same reasoning to a case of simple mistake. There the words which were rejected were part of a printed form, and ought to have been struck out as inconsistent with the instructions given by the testator, but the person who prepared the will omitted to strike them. Sir C. Cresswell, after referring to *Allen v. McPherson*, said: 'I see no difference in principle between that case and the present, where a clause for which the deceased gave no instructions was not read over, formed, *per incuriam*, by the document signed by the testator. The facts of that case are in an essential manner present. There an error which the testator was ignorant was introduced



the Statute 1 Vict. c. 26, to correct an error  
The facts in that case were as follows: The  
e oral instructions for a will to his attorney,

BOOK III.

CHAP. V.

rary to the intention  
to drew the will that  
uld be in it. In the  
e testator intended  
e disposing of the  
personalty should be  
he left it to another  
se the language by  
ion should be carried  
he read and adopted  
language so chosen.  
anguage having been  
is asked to remedy  
; by rejecting words  
estator is proved to  
ant, but by modify-  
e used by the drafts-  
ed by the testator,  
it express the sup-  
of the testator. This  
ake a new will. The  
aintiffs is, that the  
; personalty only in  
he gave instructions  
r clause, because he  
disposed of. If so,  
; of carrying out the  
uld have been to say,  
my personal estate;  
;e the error consists  
uted the word 'real'

Upon this hypo-  
t is asked to strike  
sal' not because the  
n be in the form the  
d, but because it  
uformed shape sub-  
out the testator's  
so to be observed,  
; form, but probably  
l be different; for a  
esidue of the testa-  
ld, according to the  
s, include the realty,  
xt clearly excluded  
Wills, ch. 22. *The*  
*oration of Hamilton*  
oo. P. C. 76.) Such  
g with wills would  
t dangerous conse-  
would convert the  
; into the court of  
very peculiar kind,  
uld be to shape the  
nity with the sup-  
of the testator. In  
; cases which come  
of Law and Equity,

as to the proper construction of  
wills, the intention of the deceased  
is supposed to be seen, but the ques-  
tion is whether the language used  
expresses the intention. If the  
process now sought to be applied to  
this will were to be adopted, the  
Court of Probate will in future be  
asked, first to ascertain by extrinsic  
evidence what the testator's inten-  
tion was, and then to expunge such  
words or phrases as, being removed,  
will leave a residuum, carrying out  
the intention of the testator in the  
particular case, though different in  
form, and possibly in legal effect,  
from that which the testator or his  
advisers intended. If I felt myself  
at liberty to adopt such a course, I  
should think that the best amend-  
ment of the will would be to leave  
the word 'residue' by itself in the  
residuary clause, as it is in the memo-  
randum of instructions. But it is  
obvious that, though this might give  
effect to the testator's wishes in this  
instance, it would be by an accident;  
for the word 'residue,' taken with  
the context of the will, might have  
had a different effect to that which  
it has in connexion with the context  
of the instructions: but, for the  
reasons I have given, I entirely  
repudiate this mode of altering the  
language of a testamentary instru-  
ment, and I am therefore of opinion  
that whether the error which has  
undoubtedly crept into the will be  
one of omission or insertion, it is  
equally beyond the jurisdiction of  
the Court to correct it. I have thus  
far considered the case apart from  
the decision of Lord Penzance in  
*Guardhouse v. Blackburn*, L. R. 1  
Prob. 109, but I must add that it  
appears to me that that is an au-  
thority directly decisive of this case  
in favour of the defendants. It was  
there established to the satisfaction  
of the Court that specific words had  
been inserted by the attorney who  
drew the codicil by mistake, and  
without instructions. Yet the  
learned Judge held that as the con-  
tents of the codicil had been brought  
to the knowledge of a competent  
testatrix, the execution of the instru-  
ment must be deemed conclusive

BOOK III. who made a memorandum of them in his presence. The  
 CHAP. V. residuary clause was as follows : "And the residue equally amongst all the sons, including the eldest son for the time being, on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms: "The trustees to stand possessed of all the residue and remainder of my *real* estate in trust to divide the same," &c. The draft will was left with the testator, and, on his suggestion, certain alterations were made in it, but not in reference to the words of the residuary clause above given, and the will, with these words, was executed by the testator. It was contended that the Court might correct the error which had evidently occurred, either by inserting the words "and personal" after "real" in the residuary clause, or by omitting the word "real," thus making the devise general. But the Court held that the terms of the Statute precluded the introduction of any words into the will, and that the circumstances of the case were equally a bar to the omission of the word "real."

evidence that she approved as well as knew the contents. If I did not agree in the reasons given by Lord Penzance for his decision, it would be my duty to follow it in a similar case; but I must add, that I entirely adopt my predecessor's very lucid exposition of the rules by which this Court ought to be governed with reference to the rejection of the whole or part of a duly executed testamentary document." The case of *Harter v. Harter* is, of course, an authority on the construction of "The Wills Act, 1873," and will be applicable to wills made after the 31st December, 1873. As to the authority of the Court to correct an error in a will, see *Fawcett v. Jones*, 3 Phillim. 434; *Bridge v. Arnold*, 2 Phillim. 455; *Barton v. Robins*, 2 Phillim. 455, n.; *Damer v. Pechell*, 2 Phillim. 458; *Gerrard v. Gerrard*, 2 Phillim. 459; *Micklin v. Franklin*, 2 Phillim. 461; *Lord St. Helens v.*

*Marchioness of Exeter*, 2 Phillim. 461, n.; *Travers v. Miller*, 3 Add. 226; *Bayldon v. Bayldon*, 3 Add. 232; *Draper v. Hitch*, 1 Hagg. 674; *Castell v. Tagg*, 1 Curt. 298; *Uphill v. Marshall*, 3 Curt. 636; *Allen v. McPherson*, 1 H. L. C. 191; In the goods of *Duane*, 2 S. & T. 590; *Lister v. Smith*, 3 S. & T. 282; 32 L. J. P. 13; *Reffell v. Reffell*, L. R. 1 Prob. 139; *Charter v. Charter*, L. R. 2 Prob. 315; *Guardhouse v. Blackburn*, L. R. 1 Prob. 109; 1 Williams Exors. 343; and as to the confirming effect of a codicil with regard to an error in a will previously executed, see *Rockell v. Foulke*, 3 Phillim. 141; *Shadbolt v. Wough*, 3 Hagg. 570; In the goods of *Wilson*, 2 Curt. 853; *Mitchell v. Gard*, 3 S. & T. 275; 32 L. J. P. 139; *Birks v. Birks*, 4 S. & T. 23; 34 L. J. P. 90; *Drake v. Drake*, 8 H. L. C. 172; 29 L. J. Ch. 856; *Stanley v. Stanley*, 2 J. & H. 491; *Atter v. Atkinson*, L. R. 1 Prob. 665.

## CHAPTER VI.

### OF CONDITIONAL OR CONTINGENT WILLS.

1. A will may be made to take effect only on a contingency.
2. Such a will cannot take effect until the contingency happens.
3. A power may be given to a legatee to disallow a testamentary provision.
4. Instance of will held not to be conditional.
5. Further example.
6. The Court is strongly disinclined to hold a will to be conditional.
7. Parol evidence cannot, since the new Statute, be admitted to show that the testator adopted a contingent will after the time had passed within which the contingency was to happen.
8. Case of *Roberts v. Roberts* decided under 1 Vict. c. 26. It is an authority upon our new Act.
9. A will of personalty, dependent on a contingency which never happens, may be adopted and recognized by the testator as his will.
10. A codicil, contingent on an event which does not happen, is still a re-execution of a will therein referred to, and is entitled to probate.

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1. Papers propounded as wills are frequently contingent or conditional in form, and difficulty is sometimes experienced in determining whether or not, in the events that have happened, the will is to take effect. The question turns upon the point whether the contingency is referred to as the occasion of making the will, or as the condition upon which the instrument is to become operative. Ordinarily, where the instrument is executed with all the requisite formalities, it will be presumed to have been done *animo testandi*, notwithstanding that it may be expressed to have been made to avoid the contingency of dying intestate, in case the testator should not return from a contemplated journey. In such a case, in order to

BOOK III.
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BOOK III. render the instrument contingent in its operation, it should
 CHAP. VI. clearly appear by its language that it was not intended to remain as an operative will, except in the event of the failure to return (a).

2. Where the will is made dependent on a condition precedent, it cannot be upheld as a will unless the condition is performed. Thus, where the deceased, a master mariner, whilst on a voyage, wrote with his own hand a will which commenced, "This is the last will and testament of me, in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath," &c., the Court held that the dispositions of the will were dependent on the event referred to at the beginning of it, and that it had therefore only a contingent operation, and probate was refused (b).

3. So where a testator wrote a codicil which concluded as follows: "I give my wife the option of adding this codicil or not, as she may think proper or necessary," it was held that the validity of the paper was conditional on the assent of the wife, and that, as she elected not to avail herself of its provisions, it ought not to be included in the probate (c).

4. On the other hand, a will in these words, "I, W. M., being physically weak in health, have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *Appelina* to the floating hospital ship *Berwick Walls* in order to recruit my health, and in the event of my death occurring during

(a) 1 Redf. Wills, 177-178; 1 Jarm. Wills, 12.

(b) In the goods of *Robinson*, L. R. 2 Prob. 171; 40 L. J. P. 16; 39 L. J. P. 12; 21 L. T. N. S. 680. See also In the goods of *Porter*, L. R. 2 Prob. 22; In the goods of *Winn*, 2 S. & T. 147; 7

Jur. N. S. 764; *Parsons v. Lane*, 1 Ves. Sen. 190; *Strauss v. Schmidt*, 3 Phillim. 209; *Burton v. Collingwood*, 4 Hagg. 176; *Roberts v. Roberts*, 2 S. & T. 337; 8 Jur. N. S. 220. (c) In the goods of *Smith*, L. R. 1 Prob. 717; 38 L. J. P. 85; 21 L. T. N. S. 340.

uch time, I do hereby will and bequeath," &c., was held not to be conditional (a).

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5. And a will commencing with the words "In case of my fatal accident happening to me, being about to travel by railway, I hereby leave," &c., was held not to be contingent upon the event of the testator's death on the journey he was about to take when the will was executed (b). A will contingent in terms, but executed after the event, is thereby rendered absolute (c).

6. The authorities cited show that the Court is strongly disinclined to treat a will as conditional or contingent. In the goods of *Dobson* (d), Sir C. Cresswell stated that "he was always reluctant to treat a will as contingent."

7. In *Roberts v. Roberts* (e), the question was raised, whether the Court could receive parol evidence of the desire of the testator to adhere to or adopt a contingent will, notwithstanding that the time had passed which was limited for the happening of the event. The testator being about to sail from Liverpool to Wales, made a will which contained the following clause: "Should anything happen to me on my voyage to Wales, or during my stay there, I leave all my goods," &c. The testator returned from the voyage, but parol evidence was offered of adherence to and recognition of the will subsequently. Sir C. Cresswell, in giving judgment, after holding that the will was conditional, said, "If it be conditional, can it be rendered a valid will by adherence? There was evidence of adherence; but Mr. Pritchard contended that such evidence could not

(a) In the goods of *Martin*, L. R. 1 Prob. 380; 36 L. J. 116; 17 L. T. 7. S. 32.

(b) In the goods of *Dodson*, L. R. Prob. 88; 35 L. J. P. 54; 13 L. T. 7. S. 758; See also in the goods of *Horne*, 4 S. & T. 36; 11 Jur. N. S. 50; 34 L. J. P. 131; 12 L. T. N. 630; In the goods of *Winn*, 2 S.

& T. 147; 7 Jur. N. S. 764.

(c) In the goods of *Cawthron*, 3 S. & T. 417; 10 Jur. N. S. 51; 33 L. J. P. 23; In the goods of *Hobson*, 7 Jur. N. S. 1208.

(d) Sup.

(e) 2 S. & T. 337; 8 Jur. N. S. 220; 31 L. J. P. 46; 5 L. T. N. S. 689.

BOOK III. be admitted, since the Statute (1 Vict. c. 26), to estab-
 CHAP. VI. lish the will. It appears to me that his argument is well
 founded. The act of preserving the will cannot carry the
 case further than a parol declaration concerning it; but if
 the will in terms is conditional, the deceased could not, by
 any parol declaration, alter it. All the cases cited, were
 decided before the Stat. 1 Vict. c. 26. In principle, it is
 like the case of a will made by a married woman without
 the consent of her husband. Before the Statute, such a
 will might be established by a parol recognition after the
 husband's death, for it was considered a republication; but
 no such operation can be given to it now. In *Parsons v.*
Lanoe (a), Lord Hardwicke says, "The penning of the will
 being so (*i. e.* conditional), collateral or parol proof cannot
 be taken into consideration; for that would be dangerous,
 and what the Court since the Statute of Frauds is not
 warranted to do; for nothing will set it up but some act
 done by him after that event to republish the will, or
 defeat the condition. In that case the question arose
 under the Statute of Frauds, in relation to real estate;
 but, since the Stat. 1 Vict. c. 26, the same principles are
 applicable to wills of personal property. For these rea-
 sons, I feel bound to pronounce against the document
 propounded."

8. This case was decided under the English Statute
 Vict. c. 26, which, like our "Wills Act, 1873," requires will-
 of personal estate to be executed with the same formal-
 ties as wills of real estate. The judgment of Sir C. Cres-
 well is instructive as to the state of the law in Englar-
 prior to the passing of that Statute, and therefore as
 the present state of our law (b).

9. In England, prior to 1838, a will of personalty, ma-

(a) 1 Ves. 189.

(b) This case is of course an au-

thority on the construction of "Wills Act, 1873."

dependent upon a contingency, might have been upheld, although the event upon which it was made dependent had never happened, on evidence being given that the testator continued to recognize the instrument as his will until the time of his death (a). And such is the present state of the law regarding wills of personal estate in this Province.

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10. A codicil expressed to take effect only upon an event which does not happen, operates as a re-execution of a will then expressly referred to, and on that account is entitled to probate (b).

(a) *Strauss v. Schmidt*, 3 Phillim. 209; *Ingram v. Strong*, 2 Phillim. 294; *Forbes v. Gordon*, 3 Phillim. 625; *Burton v. Collingwood*, 4 Hagg. 176; *Bateman v. Pennington*, 3 Moo. P. C. 223; In the goods of *Tylden*, 18 Jur. 136. But see In the goods of *Ward*, 4 Hagg. 179.

(b) In the goods of *Da Silva*, 2 S. & T. 315.

CHAPTER VII.

OF WHAT MAY BE DEVISED OR BEQUEATHED.

1. General power of devising freehold lands created by 32 H. 8, c. 1.
2. The power of disposing of personalty was of gradual growth.
3. Provisions of "The Wills Act, 1873." The Statutes of Henry repealed by that Act. Enabling provisions of s. 5 of the new Act.
4. Construction of real and personal estate given by the interpretation clause of the new Act.
5. Under the present law all interests are devisable, which, on decease, if not disposed of, would go to the real or personal representative.
6. The interest of a joint tenant cannot be devised unless he survives his co-tenant. The interest of a tenant in common may be devised.
7. A devise of real estate regarded as a conveyance.
8. Consequently a testator could not, under the old law, devise real estate of which he was not seized when he made his will.
9. Rule in Equity as to equitable estates.
10. Provisions of 4 W. 4. c. 1, s. 49.
11. Construction of this section in *Whately v. Whately*.
12. Opinion of the present Chancellor.
 - (a) Results of the old doctrine.
 - (b) Remedy applied by the Legislature by 4 W. 4, c. 1, s. 49.
 - (c) Difference between our Statutes and 1 Vict. c. 26.
 - (d) Conclusion to be drawn from the difference in wording of the two Statutes.
 - (e) Opinion of *Mowat, V.-C.*, remarked upon.
 - (f) Difference between a will of real and personal estate as to construction of bequest. Peculiar language of our Statute.
 - (g) Testator in the will under consideration joins real and personal estate in one devise. This considered immaterial.
13. Statute 32 Vict. c. 8, s. 1.
14. That Statute repealed by the new Act as to wills made after the 31st December, 1873.
15. Wills of real and personal estate placed by the new Act on the same footing.
16. In order that 4 W. 4, c. 1, may apply, the testator's death must occur after 6th March, 1834.
17. Consideration of the words "contrary intention" in the 21st section of the new Act. Case of *Cole v. Scott*.
18. Case of *Wagstaff v. Wagstaff* considered.
19. V.-C. Wood's opinion in *Goodlad v. Bennett*.
20. Case of *Castle v. Fox*.

- (c) Judgment of *Malins, V.-C.*, in that case ; review of the cases.
- It is only as to the *property comprised in it* that a will is made to speak as if executed immediately before the testator's death.
- The "contrary intention" must, to be effectual, appear in the will, and must have a continuing operation to the death of the testator.
- Provisions of "The Wills Act, 1873," as to estates *pur autre vie*.
- Provisions of the Statute of Frauds as to such estates.

1. By the Statute 32 H. 8, c. 1, a general power of disposing of freehold lands of inheritance by will was enacted. This Statute was followed by the explanatory Statute 34 and 35 H. 8, c. 5, by which it was enacted that all and singular person and persons having a sole estate or interest in fee-simple, or seised in fee-simple in parcenary, or in common in fee-simple, of and in any manors, lands, tenements, rents or other hereditaments, in possession, reversion, or remainder [or of rents or services incident to any reversion or remainder, and having any manors, lands, tenements, or hereditaments, holden of the King, his heirs or successors, or of any other person or persons by knight's service], shall have full and free liberty, power and authority, to give, dispose, will, or devise to any person or persons (except bodies politic and corporate), by his last will and testament, in writing, as much as in him of right is or shall be, all his said manors, lands, tenements, rents, hereditaments, or any of them, or any rents, commons, or other profits or commodities out of or to be perceived of the same, or out of any parcel hereof, at his own free will and pleasure."

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2. The power of disposing by will of personal estate in England was of gradual growth. At the time the Canadian Statute 32 Geo. 3, c. 1, was passed, the right of bequeathing personal estate extended to the whole of the

BOOK III. goods and chattels of the deceased (a), and this right,
 CHAP. VII. therefore, became, and has since continued to be, part of
 the law of this Province.

3. By "The Wills Act, 1873" (b), the Statutes 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5, are repealed as to wills made after the 31st December, 1873 (c), and new powers of disposition are substituted; it being provided by s. 5 that "Every person may devise, bequeath, or dispose of by will, executed in manner hereinafter mentioned, all real estate and personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon his heir at law, or upon his executor or administrator; and the power hereby given shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he may be entitled thereto under the instrument by which the same were respectively created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

4. By the interpretation clause of the Act (d), it is pro-

(a) 1 Williams Exors. 1-5.
 (b) S. 46.

(c) See s. 2.
 (d) S. 4.

vided that the term "real estate" shall extend to mes- BOOK III.
 suages, lands, rents, and hereditaments, whether freehold CHAP. VII.
 or of any other tenure, and whether corporeal, incorporeal
 or personal, and to any undivided share thereof, and to
 any estate, right, or interest (other than a chattel interest)
 therein; and that the term "personal estate" shall ex-
 tend to leasehold estates and other chattels real, and also
 to moneys, shares of Government and other funds, securi-
 ties for money (not being real estate), debts, choses in
 action, rights, credits, goods, and all other property what-
 soever, which by law devolves upon the executor or ad-
 ministrator, and to any share or interest therein.

5. Under the present law, all interests in real or per-
 sonal estate which, at the decease of the testator, would,
 if not so disposed of, devolve to his general real, or per-
 sonal representatives, whether the testator be the legal or
 the beneficial owner only, or unite in himself both these
 characters, may be devised or bequeathed (*a*). Whether,
 therefore, an interest in real or personal estate can be de-
 vised or bequeathed or not, must depend upon the answer
 to the question, would such an interest, in the event of the
 death of the owner, intestate, devolve to his general real,
 or personal representatives?

6. Thus it is clear that the interest of a joint tenant
 cannot be devised in the event of the testator's death in
 the lifetime of his co-proprietor, as it survives to the co-
 tenant; and on the other hand, the interest of a tenant in
 common may be devised (*b*). An executory interest in
 real or personal estate, including an executory use, is dis-

(*a*) 1 Jarm. Wills, 40.

(*b*) 1 Jarm. Wills, 40; *Swift v.*

Roberts, 3 Burr. 1488; 1 W. Bl.
476.

BOOK III. posable by will, if it be descendible or transmissible (a),
 CHAP. VII. and so also is a right to set aside a conveyance (b).

7. It has been before remarked that a devise of real estate was regarded as a conveyance of the estate. The nature of such a devise is clearly stated by Lord Mansfield in *Hardwood v. Goodright* (c). "Though as to personal estate, the law of England has adopted the rules of the Roman testament, yet a devise of lands in England is considered in a different light from a Roman will. For a will in the civil law was an institution of the heir; but a devise in England is an appointment of particular lands to a particular devisee, and is considered in the nature of a conveyance by way of appointment; and upon that principle it is that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the Statute 32 H. 8, c 1, which says that 'any person having lands, &c., may devise,' for the same rule held before the statute, when lands were devisable by custom."

8. The consequence of this doctrine as to the nature of a devise was, that a testator could not devise any real estate of which he was not seized at the time of making his will (d).

9. And in analogy to the rule regarding legal estates, it was held by the Courts of Equity that a testator could not devise an equitable interest in real estate, unless he was entitled to such interest at the time of making his will (e). From these rules the harsh consequence followed, that if a testator was, at the time of making his will,

(a) 1 Jarm. Wills, 41; *Goodtitle v. Wood*, Willes, 211; S. C. cited 3 T. R. 94; *Roe v. Jones*, 1 H. Bl. 30; *Moore v. Hawkins*, 2 Eden. 342. *Selwyn v. Selwyn*, 2 Burr. 1131; 1 W. Bl. 222, 251; *Doe v. Griffiths*, 1 W. Bl. 606.

(b) *Gresley v. Mousley*, 5 Jur. N.

S. 583; 4 De G. & J. 73; 28 L. J. Ch. 620.

(c) 1 Cowp. 90.

(d) See also *Whately v. Whately*, 13 Grant, 436; S. C. on rehearing 14 Grant, 430, and cases there cited.

(e) 1 Jarm. Wills, 45.

seized only of a legal estate, the equitable interest being in another, and he devised his estate, and subsequently to such devise he acquired the equitable interest, his devisee was held to be a trustee for the heir, to whom the equitable interest descended; and conversely, if the testator, at the time of making his will, owned the equitable interest, the legal estate being outstanding, a devise of his interest passed only the equitable interest, though he should have subsequently acquired the legal estate; and the heir-at-law, to whom the legal estate descended, was held to be a trustee for the devisee of the equitable interest (a).

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10. Such was the state of the law in this Province when the Statute 4 W. 4, c. 1, was passed; by the 49th section of which it was enacted that "when the will of any person who shall die after the sixth day of March, one thousand eight hundred and thirty-four, contains a devise in any form of words of all such real estate as the testator shall die seized or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may have been or may be acquired by the deviser after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof" (b).

11. The construction of this section was considered by the Court in the case of *Whately v. Whately* (c). The testator had made a will dated the 13th September, 1859, containing the following clause: "I give all my real and personal estate to my executors and trustees for the purpose of this my will," and the question was whether these words were, under the Statute, sufficient to pass real estate which the testator had acquired subsequently to the

(a) 1 Jarm. Wills, 45; *Strode v. Lady Falkland*, 3 Ch. Rep. 187; 2 Vern. 625.

(b) Con. Stat. U. C. c. 82, s. 11.
(c) 13 Grant, 436; S. C. on rehearing, 14 Grant, 430.

BOOK III. date of the will. Mowat, V.-C., held that the words of the
 CHAP. VII. will did pass after-acquired real estate (a), but, on re-hearing, it was held otherwise by the majority of the Court (b), the learned Vice-Chancellor still, however, adhering to his opinion expressed in the Court below. The Court considered that the words used in the will did not import an intention to devise the testator's after-acquired real estate.

12. The present Chancellor, then V.-C. Spragge, said (c): "Before the passing of the Act 4 Wm. 4, c. 1, the law as to the passing of real and personal estate by will stood thus: As to personal estate, the will took effect as if executed immediately before the death of the testator; as to real estate, the testator could not, by any form of words, devise what he had not at the date of the will." The point "that a man cannot make a will of any lands before he has a title in them," had been determined in the House of Lords in *Brownlee v. Coke* (d); and Lord Roslyn, in *Brydges v. The Duchess of Chandos* (e), explained the rule and the true nature of a devise of real estate, in much the same terms as the same had been explained by Lord Mansfield in *Harwood v. Goodright*.

(a) "It resulted from this state of the law, that whenever a man acquired real estate, which he wished to dispose of by will, it was necessary that he should make a fresh will, if he had made one before; and so from time to time, as often as he acquired more real estate, or it would go to his heirs; at that time, his eldest son alone, if he had one. This, in a country like Canada, where real estate was in a comparatively greater number of hands, and changed hands more frequently than in Eng-

(a) 13 Grant, 436.

(b) 14 Grant, 430.

(c) At p. 432.

(d) 1 B. P. C. 19

(e) 2 Vea. 427.

land, worked, to say the least of it, inconveniently. The evil to be remedied was that a testator could not dispose by will of any property that he had not at the time. BOOK III.
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(b) "To remedy this evil, the Statute provided that a will containing a 'devise in any form of words, of all such real estate as the testator shall die seized or possessed of, or of any part or portion thereof, * * shall be valid and effectual to pass any land that may have been or may be acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof.'

(c) "Nothing would have been easier than for the Legislature to do what was afterwards done in England by the Imperial Act 7 W. 4, and 1 Vict. c. 26—to enact 'That any will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.' This, in few simple unambiguous words, places a disposition of real estate by will upon the same footing as a disposition of personal estate. If the Legislature of Upper Canada had intended to do the same, it is difficult to conceive that they would have missed so plain a way of doing it.

(d) "I think that their not making an enactment in some such terms, and the terms in which the alteration of the law is made, go far to show that the Legislature did not intend to place the disposition by will of real and personal estate upon the same footing.

(e) "My brother Mowat thought that 'when a man devises all his real estate, his purpose is to devise all he may own at the time of his death just as much as when he bequeaths all his personal estate.' With great respect for my learned brother's opinion, I think there is no warrant for this

BOOK III. conclusion. Such may have been the testator's intention,
CHAP. VII. certainly. I may even surmise that it probably was his
intention; but the language he has used is not such as, in
my judgment, to warrant the legal conclusion that such
was his intention.

(f) "In a will of personal estate there is an expressed intention that it should be a bequest of what the testator has at the time of his death, because the law gives his words expression as at the time of his death. But our Statute, making no such rule as to real estate, requires the testator to express an intention as to after-acquired property, if he has such intention. The language of the Statute, 'a devise in any form of words of all such real estate as the testator shall die seized or possessed of,' implies, or rather requires that the testator must, in some form of words, express it to be his intention to devise his after-acquired real estate. The words 'I give, or I devise all my real estate,' do not import such intention; the reason being wanting which, in the case of personal estate, imputes such intention to the testator.

(g) "There is, however, this point in the case before us. The testator joins together his real and personal estate, making one disposition of both in these words: 'I give all my real and personal estate.' Is that a form of words denoting an intention to devise after-acquired real estate? Or may it not with equal propriety be said that they denote an intention on the part of the testator to limit his bequest of personal estate to what he then possessed? I think the proper construction of the will is to read it, as to each kind of property, as the law requires it to be read, if each were expressed separately."

13. Shortly after the decision of *Whately v. Whately* the law was altered by the Statute 32 Vict. c. 8, by which

it was provided (a) that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention *appears* by the will. This section, which was adopted from the English Statute 1 Vict. c. 26, s. 24, does not apply to the wills of persons who died before the 1st day of January, 1869 (b).

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14. The Statute 32 Vict. c. 8, is repealed as to wills made after the 31st December, 1873, by "The Wills Act, 1873," but the 1st section of the former Act is, with but one verbal alteration, re-enacted by the 21st section of the new Statute, which provides that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention *shall appear* by the will.

15. The effect of this section is to put real estate upon the same footing, in respect of the devising operation of a will upon it, as was personal estate before the passing of the Act. A will, as to the personal estate comprised in it, always spoke from the day of the testator's death, without reference to the state of the property at the time the will was made; unless it appeared from the instrument itself that its operation was to be restricted to such property as the testator was possessed of at the time he made his will (c).

16. It is to be observed that the Act 4 Wm. 4, c. 1, s. 49, refers to the *testator's death* after the 6th day of March, 1834, as the event in which the Statute is to apply. The Act therefore applies to wills made before the

(a) S. 1.

(b) See s. 6 of same Act.

(c) 1 McN. & G. 529; *Douglas v. Douglas, Kay*, 400, 404; *Goodlad v.*

Burnett, 1 Kay & J. 341, 347, 348.
Per Spragge, V.-C., in *Whately v. Whately*, 14 Grant, at p. 432.

BOOK III. 6th day of March, 1834, by testators who have survived
 CHAP. VII. that date. Care must therefore be taken, in considering
 the effect of a devise contained in a will made before the
 6th day of March, 1834, to ascertain whether the testa-
 tor died before or after that date. If before, the devise
 is governed by the old law; if after, by the new.

17. Since the passing of the Stat. 1 Vict. c. 26, cases
 have frequently occurred involving the consideration
 what is sufficient to show the "contrary intention" re-
 ferred to in the 24th section of the English Act (a). In
 one case, a will made after the passing of the English Act
 contained a devise of "all the estates of which I am now
 seized and possessed;" and the word *now* was used in
 other parts of the will in such a manner as to be distinctly
 referable to the date of the will; the Court held that the
 use of the word "now" plainly denoted the "contrary
 intention" referred to in the Statute, and that therefore
 real estate acquired after the date of the will did not pass
 by it (b).

18. On the other hand, when a testator made a gift of
 "all my ready money, bank and other shares, freehold
 property, and any other property that I may now possess,"
 it was held that personal estate acquired after the making
 of the will passed by the bequest (c). The Master of the
 Rolls in this case said, "If the testator had said 'I give
 all my real and personal estate,' there can be no doubt
 that after-acquired property would have passed. So
 again if he had said, 'I give all the real and personal

(a) The 21st section of "The Wills
 Act, 1873."

(b) *Cole v. Scott*, 1 Mac. & G. 518;
 16 Sim. 259. See also *Douglas v.*
Douglas, Kay, 400; *Bullock v. Ben-*
nett, 1 Kay & J. 315; 7 DeG. M. &
 G. 283; *Goodlad v. Burnett*, 1 Kay
 & J. 341; *Jepson v. Key*, 2 Hur.
 & C. 873; *Langdale v. Briggs*, 3

Sm. & G. 246; 8 De G. M. & G.
 391, 437; In the goods of *Otley Rail-*
way, 11 Jur. N. S. 818; 34 Beav. 535;
Thomas v. Jones, 2 J. & H. 473;
 8 Jur. N. S. 1224; 31 L. J. Chanc.
 732; 10 W. R. 853; *Hughes v.*
Jones, 1 H. & M. 765, 770.

(c) *Wagstaff v. Wagstaff*, L. R. 8
 Eq. 229.

estate I possess.' Does it make any difference when he puts in the word 'now?' The words 'I possess' mean the same thing as 'I now possess.' In all these cases the law says you must read the will as if it had been written on the day of the testator's death, and you must have distinct words, as there were in *Cole v. Scott*, in order to show that the property acquired subsequently to the date of the will is not intended to pass.

19. In the case of *Goodlad v. Burnett (a)*, V.-C. Wood illustrated his opinion as to the proper construction of the 24th section of the English Act. He said, "If I refer to a particular thing, *e. g.* a ring or a horse, and bequeath it as 'my ring,' or 'my horse,' it would seem that the *contrary intention*, to which the 24th section refers, appears by the will; and the will speaks from the date of its execution; but when a bequest is of that which is generic, of that which may be increased or diminished, the Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my'" (b).

20. In *Castle v. Fox (c)*, the testator devised his mansion and estate, called Cleeve Court, with the appurtenances,

(a) *Ubi sup.*

(b) See also *Trinder v. Trinder*, L. R. 1 Eq. 695. In the goods of *Gibson*, L. R. 2 Eq. 669.

(c) L. R. 11 Eq. 542; 40 L. J. Ch. 302; 24 L. T. N. S. 536. V.-C. Malins, in this case, reviews the authorities. After referring to the various additions to the estate made by the testator after the date of his will, he says: "Looking at the transaction itself, can any man doubt what the intention of the testator was? Can there be the slightest doubt that in making these purchases—all for very small sums, except the £2,258—his object was to buy up the small patches of property which lay inconveniently intermixed

with the estate, and add them to it. This point was much pressed upon me, that I am not at liberty to go into evidence upon that question, that I am not at liberty to look at the surrounding circumstances when there is a particular devise, although I may do so when there is a general devise. It is admitted that if he had said, 'All my lands in the county of Somerset,' every thing would have passed; but because he says, I give a particular part of it, which is known by a particular name, and he has added property which is also known by that name, therefore it is not to pass, because I must read the description of *Cleeve Court* as applying only to that which was, in the

BOOK III. upon certain trusts, and gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. The testator had contracted,

strict sense of the word, *Cleere Court* at the date of his will. In pressing the argument to that extent, it must follow that the decision of the Master of the Rolls in *re Midland Railway Company* (34 Beav. 525), must be entirely wrong. In that case the testator devised 'a messuage or dwelling-house, wherein D. C. now resides, with the stables or appurtenances thereto belonging and therewith occupied.' If this argument is good for anything, nothing could pass by that description but that which was actually part of it when the will was made; but between the date of the will and the death of the testator he purchased a garden, which he attached to the existing messuage; and if the argument is to prevail, the Master of the Rolls ought to have held that the original property only passed by the will, and that the garden which had been added to it did not pass. Suppose a man has a house and garden, and he finds his garden too small, and purchases from his neighbour some more land, which he adds to his own garden, and builds a new wall. In that case I ought to hold that as to one part of the garden, if there is a residuary devise, it would pass under that; but if there is no residuary devise, then I must hold that, although he died seised of a house and garden, which garden he had enlarged after the date of his will, therefore he died intestate as to one part of the garden. Such arguments lead to conclusions utterly repugnant to sense, and, as I think, repugnant to the intention of the Legislature in making this enactment. Therefore it appears to me that, whether it be a particular description, or whether it be a general description, if a testator, as in the present case, gives property by a particular name, the question is not what was known by that name when he made his will, but what was known by that name and treated by him as coming under that description at any time during his life; and I think, therefore, evidence as to his treatment of the property, and what

he called the particular estate after the date of his will, is just as legitimate evidence as evidence of what he did before the date of his will, because the words of the statute are, that I am to read the will as speaking immediately before the death of the testator, unless a contrary intention appears. No such contrary intention does appear here, and therefore I think the whole of this evidence, showing what the testator treated as part of the *Cleere Court* estate not only before but between the date of his will and his death, is as legitimate as any evidence that can be given for the purpose of putting the Court in the position of the testator. It happens here that between the date of the will and the death of the testator there is an interval of only five years, but I have had many cases where, between the making of the will and the death of the testator, there has been twenty or thirty years' interval. A man may add a great deal to an estate during that time, but although he may have done so, and may have described it in a deed after the date of his will as an estate, according to the argument I am not at liberty to receive that evidence, because I can only receive evidence as to what was part of the estate at the date of the will. The argument is further carried to this extent: It is said that this is distinctly shown by the residuary devise—'I give and bequeath all the rest, residue, and remainder of my property of every description other than those hereinbefore mentioned and expressed.' It was argued that 'hereinbefore mentioned and expressed' is only that which he had the date of the will; that that only is mentioned; *ergo*, nothing can pass but that which is there mentioned. The effect of that, again, is to abrogate the statute and to pass over the words of the Legislature altogether. Many cases have been put by way of illustration, and I think the case in *Mr. Jarman's* book (1 *Jarm. Wills*, 309), about the house in *Grosvenor Square*, is a very good one. 'Suppose a testator has

before the date of his will, to purchase an estate near to and adjoining the Cleeve Court estate, which was conveyed to him subsequently. It was held that evidence

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CHAP. VII.

house in *Grosvenor Square*, and he says in his will, "I give my house in *Grosvenor Square*;" then suppose he sells the house he had at the date of his will, and buys another in *Grosvenor Square*; my opinion is (and I have not a doubt about it), that under that general description, "my house in *Grosvenor Square*," the house would pass. The Legislature says I must read the will as if it were made immediately before the death of the testator. Doing that, I find he has a house in *Grosvenor Square*, and that must necessarily pass. But if he adds a description showing that he meant a particular thing only—if, for instance, he says, "I give my house, No. 2 *Grosvenor Square*," and if he afterwards sells that house and buys No. 6, I am equally clear that No. 6 would not pass, because a contrary intention is expressed. He has sold the house No. 2, and has no longer got it, and the devise is adeemed by the sale of that house, and you cannot apply the general description of "my house" where he has specifically described the house by name. Therefore I am as clearly of opinion that in that case it would not pass, as I am of opinion it would pass in the former case.' So I answer the question put by Vice-Chancellor Knight Bruce with regard to the brown horse (2 De G. & Sm. 733): 'Suppose a man to have a brown horse,' the Vice-Chancellor says, 'and bequeath it, and then to sell it, and buy another brown horse, and die, does the horse of which he was possessed at the time of his death pass?' I should say, unless he uses other words to describe the brown horse, all I am at liberty to ask is, had he a brown horse when he died? Yes. Then he has said, 'I give my brown horse,' and that is the one he applied the description to, and it is perfectly immaterial that he had another brown horse when he made his will. Those are the general rules that are applicable to this subject, and I say so because at the same time that they carry into effect the intention and language of the Legisla-

ture, I am satisfied they also carry into effect the intention of the testator. Now, is there anything to be found in the cases which have been cited contrary to this view? The general rule laid down by Lord Justice Turner in *Lady Langdale v. Briggs* (8 D. M. & G. 391) is in strict accordance with it. With regard to the case of *Lord Lilford v. Powys Keck* (30 Beav. 300), a distinction was attempted to be drawn there, because the testator said: 'I give all my freehold estate of or to which I am seised or entitled, and I give the copyhold estate, which I am, or at the time of my death shall be possessed of or entitled to.' It was argued, that inasmuch as he had, with reference to the copyholds, pointed to the acquisition of other property, and had not done so as to the freeholds, therefore after-acquired freeholds should not pass, as he had shown an intention that after-acquired copyholds should pass. But I am happy to find that the Master of the Rolls did not give any sanction to that argument, but gave effect to the broad intention of the Legislature, and held, that inasmuch as the testator said he gave all his freehold estate, that the will spoke for that purpose from the death of the testator, and passed everything he had at the date of the will, as well as all he acquired afterwards. Two other cases were cited to me—*Miles v. Miles* (L. R. 1 Eq. 462), and *Cox v. Bennett* (L. R. 6 Eq. 422)—one before Lord Romilly, and the other before Vice-Chancellor Giffard. In each case the testator gave a particular house of which he was a leaseholder at the date of his will, but of which he acquired the freehold afterwards. In both those cases it was decided that, having devised a particular thing, it passed every interest the testator subsequently acquired in it. In *Goodlad v. Burnett* (1 Kay and J. 341), a very extended construction was given to a will by the present Lord Chancellor, when Vice-Chancellor. In that case, the testator said:—'I give all my 3½ per Cents.' and it was there

BOOK III. was admissible to show what property the testator designed by the particular description, up to the time of his death, and that all the property acquired after the date

said he only intended to pass the $\frac{3}{4}$ per Centa. he had when he made his will; but he more than trebled them afterwards. The words were general, and the Vice-Chancellor there applied the rule I do here, and made the will speak as from the death of the testator, and said:—'All you can ask is, what $\frac{3}{4}$ per Centa. he had at the time of his death. The will speaks from the time of his death, and all he had then passed.' In the case of *Doe v. Walker* (12 M. & W. 591), the testator, having acquired property after the date of the will, said: 'I devise the lands I have;' and the question was, whether those words were to speak at the time of the making of the will, or at the time of the death of the testator; and it was decided by the Court of Exchequer on the broad principles of common sense, and in accordance with what was the intention of the Legislature, that the will was to speak from the death of the testator, and that the words 'the lands which I have,' meant 'the lands I have at the time of my death;' and therefore after-acquired lands passed. Then, there is a case which has been a good deal commented upon, the case of *Cole v. Scott* (1 McN. & G. 518), and which came first before Sir *Launcelot Shadwell*, and afterwards before Lord *Cottenham*. I argued it before both those learned Judges. I was, at the time, entirely dissatisfied with the result of the decision, and I am equally dissatisfied now. It is not necessary for me to go into it, because the decision entirely depended upon a word which is not to be found in this will, the word 'now.' In *Doe v. Walker*, sup., it had been decided that the words 'the lands which I have' passed after-acquired lands. Lord *Cottenham* came to a contrary conclusion, namely, that 'the lands which I now have' meant 'lands which I have at the date of the will,' and did not pass after-acquired land. I confess I am totally at a loss to see the distinction between the expression 'lands which I have,' and 'lands which I now have.' It is merely a

differing form of expression applying to the present tense. 'The lands which I have' means lands which I now have;' and in both cases I am of opinion, on principle, that Lord *Cottenham* ought to have applied the rule that the will is to speak immediately before the death of the testator. As the testator dies, he is supposed to say, 'I give all the lands I now have;' and therefore, I think it ought to have passed subsequently-acquired lands. The word 'now' does not occur here, and therefore it is not necessary for me to decide in opposition to that case; but I have no hesitation in saying, that if the word 'now' had occurred here, I should have come to the same conclusion that I now do, and decided in opposition to *Cole v. Scott*, sup., in order that the case might be carried further, if the parties desired, and that that decision might be reconsidered. In the meanwhile I can only express my dissent from it. The case of *Webb v. Bing* (1 Kay & J. 580), decided by the present 4th Chancellor, when Vice-Chancellor, turned upon very peculiar circumstances. The words in the will were: 'I give my executors all my *Quendon Hall* estates in Essex.' Upon the principle I have adverted to, I take it to be quite clear that every addition the testatrix had made between the date of her will and her death to the *Quendon Hall* estates ought to have passed, but the description was a very inaccurate one, and the evidence, in my opinion, totally failed to show that the lands she afterwards acquired were an addition to that estate, and I think it was upon the failure of the evidence to prove that it was part of the estate that the decision of the Vice-Chancellor entirely proceeded; because in so many other cases he decided that after-acquired property does pass by a general description in the will. But, if the intention was to decide in that case, that any additions made by the testatrix to the *Quendon Hall* estate, between the date of her will and her death, did not pass, I should most

of the will, and treated by the testator immediately before his death as additions to the Cleeve Court estate, passed under the particular devise. BOOK III.
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21. It will be remarked that it is only as to the property comprised in it, that a will is, by the 21st section of "The Wills Act, 1873," made to speak and take effect as if executed immediately before the testator's death; it does not extend, therefore, to the *objects* of the testator's bounty (a); nor can the Statute be construed to make good a devise executed by an infant on the ground that, at the time of death, the infant had attained full age (b); nor is the Statute applicable to the construction of a clause, *excepting* property from the operation of the will (c).

22. In order to exclude the operation of the section under discussion, the *contrary intention* must appear in the will, and must have a continuing operation down to the death of the testator. The will must be taken as if executed immediately before the death, and when so taken must show a *contrary intention* (d).

respectfully dissent from that conclusion. I cannot help thinking, in a case like this, where it is clear beyond all doubt that these lands were an addition to this estate, the Lord Chancellor would come to the same conclusion as I do, that all additions of that kind to that particular estate would as much pass by the description as if they had been in the possession of the testator at the date of his will. There is one other case I must refer to, of *Hughes v. Hoeking*, 11 Moo. P. C. 1, which apparently, at first sight, is opposed to *Doe v. Walker*, 12 M. & W. 591; but I think it is perfectly clear, upon looking at the case, that it proceeded upon the ground that there was a particular description of the thing devised in the original will—words like the words 'I devise my house No. 2, Grosvenor Square,' or 'the brown mare I bought of A. B.'—something added to, or limiting it to, a particular property; and that it

was on that ground the case was decided, and not in the slightest degree in opposition to the decision of *Doe v. Walker* (sup.).

(a) *Bullock v. Bennett*, 1 Kay & J. 315; 7 D. M. & G. 283.

(b) *Hayes & Jarm. Wills*, 43 n. (i.)

(c) *Hughes v. Jones*, 1 H. & M. 765.

(d) Per Lord Westbury, in *Thomas v. Jones*, 1 D. J. & S. 63, 83; 12 J. & H. 475; 8 Jur. N. S. 1224; 31 L. J. Ch. 732; 10 W. R. 853. See further upon the construction of this section the following cases:—*Hutchinson v. Barron*, 6 H. & N. 583; 9 W. R. 538; *Williams v. Owen*, 2 N. R. 585; *Hepburn v. Skirving*, 4 Jur. N. S. 651; *Stevens v. Bayley*, 8 Ir. C. L. Rep. 410; *Hawkins Constr. Wills*, 18; *O'Toole v. Brown*, 3 E. & B. 572; *Stokes v. Solomons*, 15 Jur. 483; *Dobson v. Bowman*, L. R. 5 Eq. 404; *Gibbon v. Gibbon*, 13 C. B. 211; 17 Jur. 416; *Lloyd v. Davis*,

BOOK III. 23. In the enumeration of the estates or interests
 CHAP. VII. which a person is enabled by the fifth section of "The Wills Act, 1873," to dispose of by will, occur estates *pur autre vie*. These estates differ from all other interests, freehold or chattel, in this : that they are capable of being rendered transmissible to either real or personal representatives, according to the terms of the instrument creating the estate ; or rather the instrument vesting it in the deceased owner, or in the person under whom he derived his title by act of law (a).

24. Estates *pur autre vie* are expressly made devisable by the 12th section of the Statute of Frauds, which required that a devise of an estate *pur autre vie* should be attested by three witnesses. Where such an estate, however, was not limited to the heirs of the owner, it was distributed as part of his personal estate whether he died testate or intestate ; and, as a necessary consequence, an executor, taking it as such, was bound to give effect to any bequest or direction in the will affecting such property, though the will might not have been attested in the manner required by the Statute of Frauds (a).

15 C. B. 76 ; 18 Jur. 105 ; *Struthers v. Struthers*, 5 W. R. 809 ; *Pierce v. Attorney-General* ; *Pierce v. Harrison* 3 W. R. 612 ; *Emuss v. Smith*, 2 De G. & S. 722 ; Sugd. R. P. Stat. 365 ;

Hensman v. Fryer, L. R. 3 Ch. App. 420 ; *Wheeler v. Thomas*, 7 Jur. S. 599.

(a) 1 Jarm. Wills, 55.

BOOK THE FOURTH.

OF THE REVOCATION OF WILLS.

CHAPTER I.

OF REVOCATION BY MARRIAGE AND BIRTH OF CHILDREN, OR BY MARRIAGE ALONE.

1. Rules laid down by the Court in the case of *Marston v. Fox*, with regard to the revoking effect of marriage.
2. Marriage and birth of issue required to effect a revocation. Marriage alone, or birth of issue alone, is insufficient.
3. The will of married man having children may be revoked by birth of other children and circumstances showing an intention to revoke.
4. Judgment of Sir J. Nicholl in *Johnston v. Johnston*. The grounds on which marriage and birth of issue operate as a revocation explained.
5. Marriage and birth of issue create such a change in condition that the will is presumed to be revoked.
6. The will of a widower revoked by marriage and birth of issue.
7. The birth of a posthumous child is sufficient to effect a revocation. The will, having been revoked by the birth, is not revived by the death of the issue.
8. It is only in the event of no provision having been made for children, that the birth of issue revokes a will.
9. And the will must devise *all* the testator's property.
10. The birth of a child alone does not revoke a will made after marriage.
11. But the birth of a child, together with other circumstances, may effect such revocation.
12. The revoking rule will not apply, when the effect of the revocation would be to benefit exclusively a child *in esse* when the will was made.
13. Effect of the abolition of primogeniture in this Province.
14. The marriage of a *feme sole* had always the effect of revoking her will.
15. Wills and testaments only in the strict sense revoked.
16. Provisions of 32 Vict. c. 8, as to revocation by marriage and alteration of circumstances.
17. Provisions of "The Wills Act, 1873," on same subject.

18. Remarks of Jarman on the provisions of the new Act regarding revocation by marriage, &c.
19. If testator has made his will before 19th December, 1868, and has married after that date, and has survived the 31st December, 1868, the will is not revoked by his marriage.
20. The marriage of a testator before the Act was passed, and the birth of a child after that time, revoke a will made before the Act was passed.
21. Marriage on the day of, but subsequent to, the execution of a will, revokes the will.
22. Case of In the goods of *Worthington*.

BOOK IV. 1. In the leading case of *Marston v. Fox* (a), the Court of Exchequer Chamber, on appeal from the Queen's Bench, held: 1st. That when an unmarried man, without children by a former marriage, devises all the property he has at the time of making his will, and leaves no provision for any child of a future marriage, the law annexes to such will the tacit condition that if he afterwards marries and has a child born of such marriage, the will shall be revoked. 2nd. That such revocation is not prevented by a provision in the will, or otherwise, for the future wife only; the children of the marriage must also be provided for. 3rd. That such revocation is not prevented, if property acquired by the testator after making his will descend upon the child of such marriage on the testator's death. 4th. That evidence (not amounting to republication) cannot be received in a Court of law to show that the testator meant his will to stand good, notwithstanding the subsequent marriage and birth of issue.

2. It will be observed that both *marriage and birth of issue* were required to effect the revocation under the circumstances above stated. Marriage alone did not operate as a revocation of a man's will. The rule as to revocation was not confined to the case of an unmarried testator (b);

(a) 8 A. & E. 14; 2 N. & P. 504; (b) *Christopher v. Christopher*, cited in 4 Burr. 2182; S. C. Dick, 445.

but applied also to the case of one whose wife subsequently deceased, and who married again, and had issue of the subsequent marriage.

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3. And a will made by a married man having children, was held to be revoked by the subsequent birth of other children left unprovided for, *aided by other circumstances, concurring clearly to show that it was not the intention of the deceased that the will should operate*; the Court taking the subsequent birth of issue as the essential basis of the proof, accompanied by the other concurrent circumstances of the deceased, that the will should not take effect (a).

4. In the very elaborate judgment of Sir John Nicholl in this case, the rule with respect to implied revocations is traced up to its origin; and the authority upon which the rule stood, and the principle upon which it is founded, are explained. The learned judge, after reviewing various established cases, decided in favour of presumptive revocations; and referring to some of the cases in which the presumption has been considered as rebutted (b), proceeded in his judgment by observing that "in all these cases, and in several others, the will was not absolutely revoked, though followed both by marriage and issue; in such questions, whether it be to examine if the presumption be raised, or whether it be to examine if the presumption be rebutted, the Courts always inquired into all the circumstances of the case. What then was the true sense and sound reason and foundation of the rule itself? In looking through the several cases, the foundation upon which the presumption stood, as pretty constantly stated, was the alteration in the testator's circumstances between the time of making his will and the time of his death. If it

(a) *Johnston v. Johnston*, 1 Phil. 447.

(b) *Brown v. Thompson*, 1 Eq. Cas. Abr. 413; *Brady v. Cubitt*, 1 Doug. 31;

Kenebel v. Scrifton, 2 East. 530; *Ex parte Earl of Ilchester*, 7 Ves. 348; *Sheath v. York*, 1 V. & B. 390.

BOOK IV. stood so general as the *mere alteration of circumstances*,
 CHAP. I. it would be very loose indeed. If it be added *total alteration of circumstances*, it is not much more definite. But we find that the Courts required such an alteration of circumstances, arising from new *moral* duties accruing subsequent to the date of the will, as, by necessary implication, created an *intention* to revoke. Intention is the very foundation and corner stone, the very essence of all wills. It is the principle of revocation, whether it be direct by act, or implied by circumstances. The *animus testandi* or *revocandi* is the governing principle. By Courts holding that marriage and the birth of children were not an absolute revocation, but only an implied revocation, by their inquiring into all the circumstances, it was quite obvious that they examined into and endeavoured to get at the real intention; but it might be opening too wide a door, if this enquiry were to be directed to every change of circumstances. Those loose rules which prevailed in Swinburne's time, were afterwards no longer admitted. Courts had therefore required that the rule should have for its basis a change of intention, produced by, and to be presumed from, some new moral obligation arising after the will was made. Marriage and issue were supposed to produce those new moral duties. Every man was presumed to intend the making of a provision for his family."

5. And it was said by the Court in another case (a) that "The principle is, that marriage and the birth of issue create such a change in the condition of the deceased, and such new obligations and duties, that they raise an inference that a testator would not adhere to a will made previous to their existence, considering it an act of moral

(a) 1 Hagk. 711, 712.

duty to revoke that disposition, in order to make provision for his new wife and new issue; but, on the other hand, if there does not arise such a state of circumstances as to produce new duties, if the change is provided for, there is no reason to presume revocation. The question, after all, is one of presumed intention, whether to die intestate, or, notwithstanding the change of circumstances, to leave the former will existing and effective."

6. Marriage and birth of issue, whenever unprovided for, was a revocation of a will of personalty, though the testator, at the time of the making, was a widower, and the will was in favour of children by a former marriage (*a*).

7. It was not necessary to the operation of the rule of revocation above stated, that the birth of the child should occur during the lifetime of the father. A posthumous birth was a fulfilment of the condition (*b*). The will, having been revoked by the birth of issue, was not revived by the death of the issue during the testator's lifetime (*c*).

8. Again, it will be observed that the operation of the rule of revocation stated above, was made conditional on there being no provision left by the testator for any child of a future marriage. When, therefore, the testator, before making his will, or contemporaneously with it, made express provision by the will, or by a separate deed or instrument, for future issue, subsequent marriage and birth of issue did not operate as a revocation (*d*).

9. Further, in order that the will should be revoked, it was necessary that the testator should devise *all* the pro-

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CHAP. I.

(*a*) 1 Williams Exors. 188; *Holmes v. Clarke*, 1 Phillim. 339; *Walker v. Walker*, 2 Curt. 854.

(*b*) Per Lord Kenyon in *Doe v. Lancashire*, 5 T. R. 49-59; *Israell v. Rodon*, 2 Moo. P. C. 51, 63, 64; *Matson v. Magrath*, 1 Rob. 680; S. C. 6 No. Cas. 709.

(*c*) 1 Jarm. Wills, 118, 119. *Emer-*

son v. Boville, 1 Phillim. 342. Cases cited, 1 Phillim. 343; *Brad- dyll v. Jehen*, 2 Cas. temp. Lee, 193.

(*d*) *Kenel v. Scrafton*, 2 East. 530. See 1 V. & B. 465; *Brown v. Thompson*, 1 Eq. Cas. Abr. 413; *Ex parte Ilchester*, 7 Ves. 348; *Talbot v. Talbot*, 1 Hagg. 705; *Johnson v. Wells*, 2 Hagg. 561.

BOOK IV. perty he had at the time of making his will. This propo-
 CHAP. I. sition has received the support of Lord Mansfield in *Brady*
 v. Cubitt (a), and of Lord Ellenborough, in *Kenebel v.*
 Scrafton (b).

10. The birth of a child alone was not sufficient to revoke the will of a man made after marriage, it being assumed that such a contingency was contemplated and provided for by him (c).

11. But the case of *Johnston v. Johnston* (d) shows that the subsequent birth of children unprovided for by a will, *aided by other circumstances clearly concurring to show that it was the intention of the testator that the will should not operate*, effected a revocation of the will of a married man, made when he had already several children. The remarks of Sir John Nicholl in this case are very instructive, and have already been partially quoted (e). He further observes, "The birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the groundwork of *presumed* intention, and may be accompanied by circumstances furnishing as indisputable proof of *real* intention, as if the will had been made previous to the marriage. Marriage, alone, may possibly stand upon a different foundation and footing from after-born issue. Marriage is a civil contract; the wife may make her own conditions before marriage, in order to provide against the negligence or injustice of the husband; marriage settlements are usual; the law out of the real property makes a provision for the wife by dower. If she enters into the contract, and tak

(a) Doug. 31.

(b) 2 East. 541.

(c) *Doe v. Burford*, 4 M. & S. 10.
 See as to the effect on a man's will, of marriage alone, or the birth of a child alone, *Wellington v. Wellington*, 4 Burr. 2171; *Jackson v. Hur-*

lock, Ambl. 495; *Shepherd v. Shepherd*, cited in *Doe v. Lancashire*, 5 T. R. 53, note; *Wells v. Wilson*, 5 T. R. 52.

(d) 1 Phillim. 447.

(e) Par. 4.

no precaution of this sort, she takes her chance either of the husband providing for her, or of providing for herself. But after-born issue are parties to no contracts; they come into the world entirely dependent upon the parent; and if it is the legal duty of a father, while living, to maintain his children, so it is a strong moral obligation upon him not to exclude them from a provision after his death. It is true he has a right to do it; though at one time, at least in particular districts, he had not the right of excluding them; the law did not allow him to dispose of his whole property; at present he may if he pleases, and the law can afford no relief: but, by moral obligation, there is a strong foundation laid for presuming that he did not intend to exclude them. In point, then, of true reason, and sound sense, the concurrence of subsequent marriage is not essential in all cases."

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12. It has been held that, inasmuch as the object of the revoking rule is to make a provision for children born after the making of the will, effect will not be given to the rule when the consequence of the revocation would be to benefit exclusively a child who was *in esse* at the time the will was made (a).

13. But in this Province, since the abolition of primogeniture, it is conceived that if a testator who had children should, whilst a widower, have made a will, and should afterwards have married and have had issue of such marriage, the will would have been revoked as to real estate, inasmuch as the children of the second marriage would have been benefited by such revocation; such, in fact, was the rule regarding wills of personal estate, which, in the case put, were held to be revoked (b).

(a) *Sheath v. York*, 1 V. & B. 390; *Walker*, 2 Curt. 854; *Gibbon v. Ex parte Ilchester*, 7 Ves. 348. *Caunt*, 4 Ves. 849; *Wright v. Netherwood*, 2 Salk.

(b) 1 Jarm. Wills, 118; *Holloway v. Clark*, 1 Phillim. 339; *Walker v.*

BOOK IV. 14. The marriage of a *feme sole* had always the effect
 CHAP. I. of revoking her will, upon the principle that a will supposed disposing power at the time in the person making it, and that it should be always afterwards subject to the control of such person; but that was not the case with a woman after coverture; for when she entered into that engagement, she gave up her right to her own property (a). The will of a *feme sole*, revoked by marriage, was not revived by the fact that she survived her husband (b).

15. But wills and testaments only, in the strict sense, were revoked by marriage; for a will made by a woman before marriage under a power, was not necessarily revoked by her marriage (c); nor, if made after marriage, but during the life of her husband, either under a power or with his assent, was it necessarily revoked by the death of the husband (d).

16. By Statute of Ontario 32 Vict. c. 8, it is provided (e), as to the wills of persons who shall die after the first day of January, 1869, that every will shall be revoked by the marriage of the testator, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would *not*, in default of such appointment, pass to the testator's heir, executor, or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions (f); and s. 4 enacts that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. The word *not*, in s. 3, was omitted in the Act referred to; but the error was corrected by Stat. 35 Vict. c. 15, s. 3.

(a) *Doe v. Staple*, 2 T. R. 695; *Hodsdon v. Lloyd*, 2 Bro. C. C. 533; 1 Williams Exors. 184.

(b) *Forse & Hambling's Case*, 4 Co. Rep. 60-61.

(c) 1 Jarm. Wills, 114; *Loxan v. Bell*, 1 C. B. 872; and compare *Douglas v. Cooper*, 5 M. & K. 378.

(d) 1 Jarm. Wills, 114; *Morman*

v. Thompson, 3 Hagg. 239; *Clough v. Clough*, 3 M. & K. 296.

(e) S. 3.

(f) See as to the construction of the exception contained in this section, in the goods of *McVicar*, L.R. 1 Prob. 671; 38 L. J. P. 84; 20 L. T. N. S. 1013.

17. "The Wills Act, 1873," repeals the Statute 32 Vict. c. 8; but by ss. 15 and 16 of the new Act, the provisions of ss. 3 and 4 of the repealed Statute are re-enacted (a). These sections have been adopted from ss. 18 and 19 of the English Act 1 Vict. c. 26.

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18. Concerning their operation and effect, Mr. Jarman remarks (b): 1st, That, unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation, as to both real and personal estate; and that no declaration, however explicit and earnest, of the testator's wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, and, least of all, evidence collected *aliunde*, will prevent the revocation. 2nd, That merely the birth of a child, whether provided for by the will or not, will not revoke it; the Legislature, while it invested with a revoking efficacy one of the several circumstances formerly requisite to produce revocation, having wholly disregarded the other.

19. The rule in England is that if a testator has made his will before the Act 1 Vict. c. 26, [was passed, and married after that date, the will is not revoked by such marriage (c); but it is, of course, revoked by marriage and the birth of a child. The provisions of 32 Vict., c. 8, s. 5, as to revocation by marriage apply, however, to all wills of persons who survive the 31st December, 1868.

20. The marriage of a testator before the Act was passed, and the birth of a child after that time, have been held in England to revoke a will made before the Act was passed (d).

(a) The new Act applies only to wills made after the 31st December, 1873.

(b) 1 Jarm. Wills, 120.

(c) In the goods of *Shirley*, 2 Curt. 657.

(d) *Walker v. Walker*, 2 Curt. 854; In the goods of *Cadywold*, 1 S. & T. 34.

BOOK IV. 21. Marriage on the day of, but subsequent to, the execution of a will, now operates as a revocation, even though it appear from the will itself that the testator did not intend it to take effect until after the marriage (a).
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22. When, by a deed of settlement executed between a wife and her intended husband, property was conveyed to trustees to pay the income to the wife herself during her life, and, if she pre-deceased her husband, then to him for life, if she should so appoint by will, but not otherwise, and if she did not so appoint, then it was to go to the issue of the marriage; and the same day she made a will exercising her power of appointment in favour of her intended husband; it was held that the will came within the exception of the 18th section of the English Act, and was not revoked by the subsequent marriage (b).

(a) *Otway v. Sadler*, 4 Ir. Jur.N. S. 97; 33 L. T. 46.

(b) In the goods of *Worthington*, 20 W. R. 260; 25 L. T. N. S. 853.

CHAPTER II.

OF REVOCATION BY BURNING, CANCELLING, TEARING, OBLITERATING, OR OTHERWISE DESTROYING A WILL.

1. Provisions of the Statute of Frauds as to revocation by burning, &c.
2. Provisions of 32 Vict. c. 8, on same subject.
3. Provisions of "The Wills Act, 1873," on same subject.
4. The new Statutes apply to wills of personal as well as real estate.
5. There must be *animus revocandi*. A tearing or destruction by accident, &c., will not revoke.
6. The means of revocation must be effectively used.
7. Example. Case of *Bibb v. Thomas*; tearing.
8. Tearing of signature sufficient.
9. Rule laid down by V.-C. Wood. The tearing of that which the testator has made a substantial, though by law it is not a necessary, part of the will, is sufficient to revoke.
10. Case of *In the goods of Gullon*.
11. The tearing off of a seal and part of a word held sufficient; or the drawing of lines through the testator's name.
12. A will taken from the fire before being burnt held unrevoked.
13. If the intended act of revocation is not completed, there is no revocation.
14. A will torn in four pieces held unrevoked.
15. Case of *Elms v. Elms* to same effect.
16. A will torn under a misapprehension as to its validity considered not revoked.
17. A will held unrevoked though several lines had been cut off.
18. When the revoking act is merely deliberative it will not effect a revocation.
19. A will may be *partially* revoked by obliteration, &c. The whole question considered by Sir J. Dodson in *Clarke v. Scripps*.
20. The erasure of the name of one of two joint devisees is a revocation *pro tanto* only.
21. Difference between the Statute of Frauds and the new Statutes;—the words "cancelling" and "obliterating" omitted from the new Statutes, and the words "otherwise destroying" substituted therefor.
22. The words "otherwise destroying" mean a destruction *eiusdem generis* with the other modes mentioned in the Act.
23. Case of *Stephens v. Taprell*. The 20th and 21st sections of the English Act considered.
 - (a) Revocation by cancellation good before the Statute 1 Vict. c. 26.
 - (b) Inquiry as to the changes effected by the Act. Report of the Real Property Commissioners.

- (c) The Legislature did not adopt all their suggestions.
- (d) Is cancellation a *destruction* within the meaning of the new Act? It is not.
- (e) The 20th section applies to *total* and not to *partial* revocation.
- (f) Comparison of the 20th and 21st sections.
- n. (a) Application of the foregoing case to the provisions of 32 Vict. c. 8. Question whether the 18th section of "The Wills Act, 1873," prevents unattested alterations from being made after the 1st January, 1874, in wills executed before that date.
- 24. Cutting equivalent to tearing.
- 25. A person while insane cannot revoke his will.
- 26. The revocation of a will procured by compulsion or fraud is ineffectual.
- 27. The power to revoke a will by burning, &c., cannot be exercised in the testator's absence.
- 28. Parol declarations as to revocation already effected inadmissible to prove revocation.
- 29. A will is not revoked by mere abandonment.
- 30. After the due execution of a will is proved, the burden of proving revocation lies on those who assert it.

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1. The 6th Section of the Statute of Frauds (a) provided that a will of freehold estate might be revoked by burning, cancelling, tearing or obliterating the same by the testator himself or in his presence, and by his directions and consent; and the transaction was not required to be attested by witnesses.

2. The Statute of Ontario, 32 Vict. c. 8, adopted from the English Act 1 Vict. c. 26, provided (b) that "no will or codicil shall be revoked otherwise than by" (amongst other methods mentioned in the Act) "the burning, tearing or otherwise destroying the same by the testator, or by some one in his presence, and by his direction, with the intention of revoking the same." This Statute was assented to on the 19th December, 1868; but the 6th section provided that the Act should not apply to the will of any person who should be dead before the 1st January, 1869. With respect, therefore, to the wills of all

(a) CAR. 2, c. 3.

(b) S. 5.

persons who died before the latter date, so far as such wills affect real estate, the provisions of the old Statute will govern. BOOK IV.
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3. By "The Wills Act, 1873," the Statute 32 Vict. c. 8, is repealed as to wills made after the 31st December, 1873, but the new Act contains a provision similar in every respect to that contained in s. 5 of the repealed Act. By s. 17 of the new Act, it is provided that "No will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid," i.e. by marriage, "or," after mentioning other methods, "by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

4. It will be observed that the new Statutes apply to wills of *personal* as well as of *real* estate. Prior to the passing of these Acts, a will of personal estate might have been revoked by any of the means prescribed by the Statute of Frauds for the revocation of wills of real estate, and acts which were not sufficient to revoke a will of real estate were sufficient to revoke a will of personalty (a).

5. It is essential to the revoking operation of any of the means mentioned in the Statutes that they should be accompanied by an intention to revoke the will (b). Thus, a tearing or other mutilation of the will by accident will have no revoking effect; and evidence will be admitted to show how the mutilation occurred (c).

6. On the other hand, a mere intention to revoke by any of the means mentioned in the Statutes will not be

(a) *Reid v. Harris*, 8 A. & E. 1; 2 N. & P. 615; W.W. & D. 684; compare *Reid v. Harris*, 6 A. & E. 209; 1 N. & P. 406; W.W. & D. 106.
(b) *Burtenshaw v. Gilbert*, 1 Cowp. 52; *Clarkson v. Clarkson*, 2 S. & T. 497; 31 L.J.P. 143; 6 L.T.N.S. 506.
(c) *Bigge v. Bigge*, 9 Jur. 192; 3 No. Cas. 601; In the goods of *Thorn-ton*, 2 Curt. 913.

BOOK IV. sufficient, unless the means are effectually used. What is
 CHAP. II. such an effectual use, will be best illustrated by some of
 the decided cases.

7. Where the testator called for his will, which was handed to him while in bed, and he gave it something of a rip with his hands, and so tore it as almost to tear a bit off; then rumbled it together, and threw it on the fire, but it fell off, and one of the servants took it up and preserved it, or it would soon have been burnt up; and the testator, being informed it was not destroyed, constantly insisted it should be, until he was finally informed it had been, it was held a sufficient revocation (*a*). In this case, however, it is clear that the tearing and burning only were considered a sufficient revocation. Indeed, the Lord C. J. de Grey said, "Throwing it on the fire, with intent to burn, though it is only very slightly singed and falls off, is sufficient within the Statute."

8. Again, when the testator concluded his will with a testimonium as follows: "In witness whereof, I have to this my last will and testament, contained in five sheets of paper, to the first four sheets thereof set my hand, and to the last sheet thereof my hand and seal," and executed the will in the manner described in the testimonium; and he subsequently tore off the signature to the first four sheets with the intention to revoke it, it was held that such tearing revoked the will (*b*).

9. V.-C. Wood, who decided this case, referring to *Prix v. Price* (*c*), stated the rule to be: that "the tearing of that which the testator has made a substantial, though by law it is not a necessary part of his will, is a tearing sufficient to amount to revocation."

(*a*) *Bibb v. Thomas*, 2 W. Bl. 1043.
 See also *Hyde v. Hyde*, 1 Eq. Cas.
 Ab. 408, 409.

(*b*) *Williams v. Tyley*, 1 John. 530;
 5 Jur. N. S. 35.
 (*c*) 26 L. J. Exch. 409.

10. And when the will was written on several sheets of paper, and each sheet was signed, the tearing off the signature from the last sheet *animo revocandi* revoked the will (a).

11. The tearing off of a seal and part of a word *animo revocandi*, has been held sufficient (b). *A fortiori*, the tearing of the names of the attesting witnesses from the will, if done with intent to revoke, is a revocation (c). The drawing of lines through the testator's name has been held to be an effectual revocation (d). And the total obliteration of the names of the attesting witnesses with pen and ink was held sufficient to revoke a codicil (e). And where a will was cut in two pieces, the Court refused probate without any further proof of revocation (f).

12. On the other hand, where a testator attempted to destroy his will by throwing it upon the fire, from whence it was snatched by his niece, in whose favour it had been made, before any impression was made by the fire on the will itself, one corner only of the envelope being burned; and the niece persuaded the testator that she had destroyed the will, it was held that the will was not revoked (g). On the motion for a new trial in this case, Lord Denman, C. J., said "It would be a violence to language if we said there was any evidence to go to the jury of the will having been burnt."

13. And where a testator, having some time before executed a will duly attested, to each sheet of which he

(a) In the goods of *Gullon*, 4 Jur. N. S. 196; *Gullon v. Grove*, 28 Beav. 64. See also *Abraham v. Joseph*, 5 Jur. N. S. 179.

(b) *Price v. Powell*, 3 H. & N. 341; 27 L. J. Exch. 609; *Lumbell v. Lumbell*, 3 Hagg. 568; *Davies v. Davies*, 1 Cas. temp. Lee, 444.

(c) *Evans v. Dallow*; In the goods of *Dallow*, 31 L. J. P. 128.

(d) *Slade v. Friend*, cited by Sir G. Lee, 2 Cas. temp. Lee, 34.

(e) In the goods of *James*, 7 Jur.

N. S. 52; *Hobbs v. Knight*, 1 Curt. 768.

(f) In the goods of *Simpson*, 5 Jur. N. S. 1366. See also In the goods of *Harris*, 10 Jur. N. S. 684; 3 S. & T. 485; 33 L. J. P. 181; 11 L. T. N. S. 276; *Davies v. Davies*, 1 Cas. temp. Lee, 444; *Lumbell v. Lumbell*, 3 Hagg. 568.

(g) *Doe d. Reid v. Harris*, 6 A. & E. 209; 1 N. & P. 406; W. W. & D. 106.

BOOK IV. affixed a seal, instructed his solicitor to prepare another,
 CHAP. II. and signed the draft prepared from these instructions, and then proceeded to tear off the seals of the old will; when, after all the seals but one had been removed, he was informed that the new will would not operate upon his lands in its then state, which induced him to desist; and, before the new will was complete, the testator died, it was held that the original will remained unrevoked (*a*).

14. So also, when, upon sudden disaffection with one of the devisees, the testator tore his will into four pieces; but, upon being pacified, fitted the pieces together and expressed gratification that no more had been done, saying "It was well it was no worse;" it was held that the will was not revoked, the jury having found that the testator had not completely finished what he intended to do for the purpose of destroying the will (*b*).

15. The same principle was acted upon in the case of *Elms v. Elms* (*c*), wherein it appeared that the testator, having torn his will nearly through, was stopped by a friend before he had completed the intended means of destruction.

16. In a recent case (*d*), a testator being led by a friend to believe that his will was invalid, tore it, and told his wife to put it in the fire. The fire had not been lighted, but the wife placed the pieces in the grate. A few minutes afterwards, the testator, thinking that he and his friend might possibly be wrong, took the pieces from the grate and preserved them. It was held that there had been no revocation, the act of tearing not having been accompanied with the *animus revocandi*.

(*a*) *Hyde v. Hyde*, 1 Eq. Cas. Ab. 409. See also In the goods of *Eeles*, 2 S. & T. 600; 32 L. J. P. 4; 7 L. T. N. S. 338.

(*b*) *Doe v. Perkes*, 3 B. & A. 489. Compare In the goods of *Colbery*, 1

No. Cas. 90; 2 Curt. 832.

(*c*) 4 Jur. N. S. 765; 1 S. & T. 155; 27 L. J. P. 96.

(*d*) *Giles v. Warren*, L. R. 2 Prob. 401; 41 L. J. P. 59; 20 W. R. 827; 26 L. T. N. S. 780.

17. When, on the death of the testator, a will which had been written on the first side of seven sheets of paper, and had been signed by the deceased and witnessed on each sheet, and at the end, was found in an iron chest, in which the deceased kept important papers, and the first seven or eight lines were found to have been cut or torn off, but in other respects the will was complete: it was held that from the mere cutting or tearing off of the beginning of the will, without other circumstances, it could not be inferred that the deceased intended to revoke the whole will, and that it must be admitted to probate in its incomplete state (a).

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18. When the revoking act is merely deliberative, showing an intention to have the revocation depend upon the testator making another will, it will not be regarded as an effective revocation. Thus, where the testator wrote the word "cancelled" over his signature with his initials, and had written a memorandum on the will, part of which was, "I intend to make another will, whereupon I shall destroy this, W. B.;" and no other will could be found; the Court considered that the testator had done no sufficient act to effect a revocation under the English Statute 1 Vict. c. 26 (b).

19. A will may be partially obliterated or torn so as to effect only a partial revocation, leaving the rest of the will unrevoked (c). The case of *In the goods of Woodward*, cited above, is an instance of partial revocation by tearing or cutting. This subject was discussed by Sir J. Dodson, in the case of *Clarke v. Scripps* (d). In his judgment, he considers

(a) *In the goods of Woodward*, L. R. 2. Prob. 206; 40 L. J. P. 17; 24 L. T. N. S. 40.

(b) *In the goods of Brewster*, 6 Jur. N. S. 56; 29 L. J. P. 69.

(c) *Sutton v. Sutton*, Cowp. 812; *Larkins v. Larkins*, 3 B. & P. 16;

Clarke v. Scripps, 2 Rob. 563, 567, by Sir J. Dodson; *Christmas v. Whinyates*, 3 S. & T. 81; 9 Jur. N. S. 283; 32 L. J. P. 73; 8 L. T. N. S. 801.

(d) 2 Rob. 563; 16 Jur. 783.

BOOK IV. the whole question of revocation by the means now under
CHAP. II. consideration, and reviews the various authorities. He
says: "Out of the mutilated state of this instrument, arises
the question, not very easy of solution, namely, whether
the will is to be considered revoked *in toto* or in part only.
Upon this enactment (1 Vict. c. 26, s. 20) it is obvious,
—First, that a part only of a will may be revoked in the
manner described—in other words, that the whole will is
not necessarily revoked by the destruction of a part;
nevertheless, I do not by any means intend to say that
the destruction of a part may not, under certain circum-
stances, operate as a revocation of the entire will.
Secondly, it is to be observed that the burning, tearing, or
otherwise destroying the instrument must be done with
intention to revoke. It is not the mere manual opera-
tion of tearing the instrument, or the act of throwing it
into the fire, or of destroying it by other means, which
will satisfy the requisites of the law; the act must be ac-
companied with the *intention* to revoke; there must be
the *animus* as well as the act; both must concur in order
to constitute a legal revocation. It is the *animus*, also,
which must govern the extent and measure of operation
to be attributed to the act, and determine whether the
act shall effect the revocation of the whole instrument, or
only of some, and what portion thereof. Now, the inten-
tion of a testator to revoke wholly or in part may, I con-
ceive, be proved, first, by evidence of the expressed decla-
ration of a testator, especially if such declaration was con-
temporaneous with the act. Secondly, the intention may,
in the absence of express declaration, be inferred from
the nature and extent of the act done by a testator, *i.e.*,
it may be inferred from the state and condition to which
the instrument has been reduced by the act. From the

face of the paper itself, it may be inferred, either he did intend to destroy it altogether, or he did not."

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20. Where a will contained a devise to two persons as joint tenants, the testator striking out the name of one of the devisees, is only a revocation *pro tanto* (a).

21. It will be observed that both in the English Act 1 Vict. c. 26, s. 20, and our own Acts, 32 Vict. c. 8, s. 5, and "The Wills Act, 1873," s. 17, a change is made from the wording of the Statute of Frauds, the words "canceling" and "obliterating" being omitted from, and the words "otherwise destroying" being introduced into the recent Acts.

22. Mr. Jarman remarks that the words "otherwise destroying," in the English Act, must be taken to mean a destruction *ejusdem generis* with the modes mentioned in the same section; that is, destruction in the proper sense of the word of the substance or contents of the will, and not a destroying in a secondary sense, as by cancelling or incomplete obliteration; and he refers to *Stephens v. Taprell* (b), and *Hobbs v. Knight* (c), in support of this view of the Act (d). He further says that these latter means, unless they prevent the words, as originally written, from being apparent, that is, apparent by looking at the will itself, are plainly excluded by the Statutes (e); and that glasses or other scientific means may be used for discovering what the words obliterated originally were (f).

(a) *Larkins v. Larkins*, 3 B & P. 16; but see *Short v. Smith*, 4 East. 419.

(b) 2 Curt. 458.

(c) 1 Curt. 779.

(d) 1 Jarm. Wills, 133. See also Sugden's Essay, p. 46; In the goods of *Rose*, 4 No. Cas. 101; In the goods of *De Bode*, 5 No. Cas. 189, 191; In the goods of *Brewster*, 29 L. J. P. 69; 6 Jur. N. S. 56; *Lushington v. Onslow*, 6 No. Cas. 187; 12 Jur. 465.

(e) In the goods of *Dyer*, 5 Jur. 1016; In the goods of *Fary*, 15 Jur. 1114; *Stephens v. Taprell*, 2 Curt. 458; In the goods of *Beavan*, ib. 369; In the goods of *Rose*, 4 No. Cas. 101; In the goods of *Brewster*, 29 L. J. P. 69; 6 Jur. N. S. 56.

(f) In the goods of *Ibbetson*, 2 Curt. 337; *Lushington v. Onslow*, 6 No. Cas. 187; 12 Jur. 465; 2 Curt. 458.

BOOK IV. 23. In *Stephens v. Taprell* (a), which is one of the leading cases on the construction of the 20th section of the English Act, it appeared that a will signed by the testator, and attested by two witnesses, was found a few days after his death in a cancelled state; the body of the will was struck through with a pen; the name of the testator was crossed out, the attestation clause and the names of the witnesses were likewise run through with a pen; and what had been intended for a codicil (but which was not legally executed) was also cancelled with a pen.

(a) The Court said: "It is admitted that, prior to the 1st of January, 1838, this would have been a good revocation; for, under the old law, cancellation *animo revocandi* was a mode of revoking a will. The Act 1 Vict. c. 26, however, has made a very considerable alteration in testamentary law. By this Statute, a distinction existing under the former law is removed; wills both of personality and of lands are required to be executed and revoked in the same manner. The Court has therefore no discretion, but must govern itself by what it considers to be the true meaning and construction of the Act.

(b) "In order to arrive at the construction which ought to be put upon the Act, it may be necessary to inquire what the Act has done. In the first place, it has abolished all implied revocations; no alteration of circumstances (with one exception) with respect to the condition of a testator or of a legatee will amount to an implied revocation. The only alteration of circumstances which is to amount to a revocation of a will duly executed, is that of marriage. This alteration of the testamentary law was founded on the Fourth Report of the Commissioners appointed to examine the state of the law with respect to

(a) 2 Curt. 458.

real property, who suggested a great number of improvements of that law; and in their Fifth Proposition, 'with respect to implied revocations,' they propose that 'a will be revoked by burning, cancelling, tearing or obliterating it, with the intention of revoking it by the testator, or in his presence and by his direction; these being the modes prescribed in the Statute of Frauds.'

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(c) "The Legislature, however, in acting upon this report, did not adopt all its suggestions; for, in the first place, the enactment with respect to the revocation of a will by marriage is not founded on the report; and the suggestion 'that no will should be expressly revoked, otherwise than by another inconsistent will or codicil, or some other writing executed and attested in the same manner as shall be required for the validity of a will, they did not adopt wholly; but the 20th section stands thus: 'That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid' (that is, by marriage), 'or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed'—so far departing from the suggestion of the Commissioners and from the law as it stood before the Statute, as regards 'any other inconsistent will;' and the section goes on, 'or by the burning, tearing' (two of the modes prescribed in the Statute of Frauds and suggested in the report), omitting the words 'cancelling' and 'obliterating,' 'or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.'

(d) "Then the question comes to this: Is a will *destroyed* within the meaning of the 20th section by being struck through with a pen, the name of the testator being crossed

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out, and the names of the attesting witnesses being struck through? It appears to the Court impossible to put such a construction to the Act, as to say that cancelling a will by striking it through with a pen is a destruction of the will. When the Legislature, after mentioning 'burning' a will, and 'tearing' a will, speak of 'otherwise destroying' a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the sense metaphorically, as being a destruction of the contents of the will; it never could have been their intention, that the cancelling of a will should be a mode of destroying it. And the Court is justified in this conclusion by seeing that cancelling was advisably omitted, the Commissioners having recommended that 'cancelling' and 'obliterating,' as modes of revocation, should stand. The Legislature, however, with this recommendation of the Commissioners before them, omit 'cancelling' and 'obliterating,' and insert 'otherwise destroying.'"

(e) The Court further observed that "the 20th section applies to a total and not a partial revocation. The 21st section is founded upon part of the Fifth Proposition of the Commissioners, who recommend that 'where a will is found with unattested obliterations, it should be considered wholly unaltered, except that, if any words cannot be read or made out in evidence in consequence of the obliteration, the will shall take effect as if such words did not form part of it.' Here again the Legislature have not adopted the whole of the recommendation; the terms they have used are, 'except as far as the words or effect of the will before such alteration shall not be apparent;' not adopting the suggestion that the words might be 'made out in evidence;' and the Court is obliged to reject extrin-

sic evidence, however strong it may be, as to the contents
 of the will before the attestation, and to look only to the
 will itself, and when it finds a word to be utterly illegible,
 to omit that word as well as the word substituted.

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(f) "Whether the Commissioners would have recommended that partial alterations should have this effect, if they had known that the Legislature would have rejected the other part of their recommendation, it is difficult to say; as it stands, there seems some inconsistency. If an alteration be made in a single legacy by striking it through with a pen, it is of no effect unless it be attested by witnesses, or unless the original word be rendered utterly illegible. If the construction contended for be correct, then the Legislature would have said that the whole might be revoked by a mode more simple than is required for a small part; that where all the legacies were struck out but one, the whole must have effect; whereas if that one be also struck out, then the whole will is revoked. This never could have been intended; it could not have been the intention of the Legislature that the striking a will through with a pen should be a mode of revocation. 'Cancellation' and 'revocation' are different terms, though sometimes confounded; cancellation being an equivocal act. It appears to the Court that the Legislature, having advisedly omitted 'cancelling' amongst the modes of revocation, and substituted words of more equivocal meaning, cannot have intended that striking through with a pen should have been a mode of revocation; and that if they did consider cancellation to be a mode of revocation, they would have taken care to render their meaning clear" (a).

(a) The language of the Court in the foregoing case applies exactly, it is conceived, to the 5th section of the Statute 32 Vict. c. 8, and the 17th section of "The Wills Act, 1873," which are almost literal counterparts of the 20th section of the English Act. The 5th section of the

BOOK IV. 24. Cutting is equivalent to tearing (a); and when a
 CHAP. II. revocation by cutting or tearing has once been effected, the will cannot be revived by a mere physical restoration, even though supported by declarations showing an intention to revive. Thus, when on the death of the deceased a will was found, the signature to which had been cut out, but had been gummed on to its former place, and the will had been in the custody of the testator up to the time of his death, and declarations of the deceased, made subsequent to the date of the will, were proved of an intention to benefit his wife by his will, and no other will was forthcoming; it was held that the presumption that the deceased cut out the signature *animo revocandi* was not

Statute 32 Vict. c. 8, applies, therefore, to total, not to partial revocations by obliteration or cancellation; and that Act contains no provision corresponding to the 21st section of the English Statute. The law as to partial revocation by obliteration was, therefore, unaffected by the Statute 32 Vict. c. 8. If this be so, it follows that any will made before the passing of the Act 32 Vict. c. 8, may, notwithstanding that Act, be revoked or altered by obliteration or cancellation to any extent short of a total alteration or revocation of the whole instrument. It will be observed that the 2nd section of "The Wills Act, 1873," provides that, unless therein otherwise expressly provided, the Act shall not extend to any will made before the 1st January, 1874. The question arises, Do the provisions of the 18th section with respect to obliterations, &c., apply to obliterations, &c., made after the 1st January, 1874, in wills executed before that date? The provision as to obliterations, it will be remembered, is not contained in the Statute 32 Vict. c. 8. There would seem to be strong ground for argument that, if the will is made before the 1st January, 1874, it may be altered after the Act comes into force in the same manner as under the present law. It would seem to be an answer to any objection to al-

terations on the ground of their not being duly executed in accordance with the provisions of the 18th section, that the will, being made before the 1st January, 1874, did not come within the Act. And as informal wills of personalty, unattested and unsigned, made before the Act comes into force, will continue to be valid, there seems to be no inconsistency in permitting such wills to be altered as under the present law. The construction put upon the English Statute 1 Vict. c. 26, is, however, against the view now advanced. By the 34th section of that Act, it is provided that the Act shall not extend to any will made before the 1st January, 1838; yet it has been held: In the goods of *Levock*, 1 Curt. 906; *Hobbs v. Knight*, 1 Curt. 768; *Brooke v. Kent*, 3 Moo. P. C. 334; *Ferraris v. Hertford*, 3 Curt. 468, 512, 513; *Croker v. Hertford*, 4 Moo. P. C. 339, 356, that a will made before the Statute came into operation is not exempted from the necessity of complying with the provisions of the new law, with respect to any act done to it after that period. See 1 Williams Exors. 125.

(a) *Hobbs v. Knight*, 1 Curt. 768; In the goods of *Cook*, 5 No. Cas. 390; *Clarke v. Scripps*, 16 Jur. 783; 2 Rob. 563, 567; In the goods of *Simpson*, 5 Jur. N. S. 1366; In the goods of *Nelson*, 6 Ir. Rep. Eq. 569

rebutted, and that the gumming on the signature in its proper place did not revive the will (a).

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25. A person, while insane, cannot be said to possess intention, and therefore he can no more revoke a will than he can make one. Any act which, if the testator had been sane, would have been a sufficient revocation of a will, if done *animo revocandi*, will therefore, if done by the testator whilst insane, be of no force or effect whatsoever (b).

26. The revocation of a will procured by compulsion is ineffectual. Thus, when a woman having made a will under a power, was compelled to destroy it by her husband, the will was held to be unrevoked (c). A will fraudulently destroyed may also be established (d).

27. The power to revoke a will in the testator's absence cannot be created; therefore the direction by a testator that his will shall be destroyed, either in his lifetime (e) or after his death (f), is inoperative, the Act requiring the destruction to be in the presence and by the direction of the testator. Where a wife destroyed her husband's will without his consent, the Court admitted a copy of the will to probate (g).

28. Declarations of a deceased person that he had re-

(a) *Bell v. Fothergill*, L.R. 2 Prob. 148; 18 W. R. 1040; 13 L. T. N. S. 323.

(b) *Scruby v. Fordham*, 1 Add. 74; In the goods of *Brand*, 3 Hagg. 754; In the goods of *Downes*, 18 Jur. 66; *Borlase v. Borlase*, 4 No. Cas. 139; In the goods of *Shaw*, 1 Curt. 905; *Harris v. Berrall*, 1 S. & T. 153; *Brunt v. Brunt*, L. R. 3 Prob. 37, in which case the testator having duly executed his will, subsequently, when suffering under an attack of *detrismus tremens*, tore it in pieces. The pieces were preserved, and on his recovery he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a

fresh will, which intention he did not carry out. The Court held that the will was not revoked.

(c) *Williams v. Baker*, Prerog. June 1, 1839.

(d) *Foster v. Foster*, 1 Add. 462; *Knight v. Cook*, 1 Cas. temp. Lee. 413; *Podmore v. Wharton*, 3 S. & T. 449; 10 L. T. N. S. 754; 33 L.J.P. 143; In the goods of *Colman*, 14 W. R. 291; 13 L. T. N. S. 682.

(e) *Rooke v. Langdon*, 2 L.T. 495; In the goods of *Dadd*, D. & Sw. 290; 29 L. T. 99.

(f) *Stockwell v. Ritherdon*, 1 Rob. 661; 12 Jur. 779.

(g) *Horne v. Horne*, Prob. Ct. Dec. 1859; *Hayes & Jarm. Wills*, 35 n. (y.)

BOOK IV. voked a certain will by a subsequent will not forthcoming, cannot be admitted as evidence of revocation either
 CHAP. II. by that means or by any other means, as by burning, tearing or cancellation (a).

29. A will is not revoked by mere abandonment. To effect a revocation there must be some unequivocal act of cancellation or obliteration by the testator himself, or by some other person in his presence and by his direction (b).

30. After the due execution of a will has been proved, the burthen of proving that it was revoked lies upon those who set up the revocation, and, in the absence of evidence, revocation will not be presumed. Therefore, when a will duly executed before the passing of the English Wills Act, and remaining in the testator's custody until his death after the passing of that Act, was found with his signature crossed out—a mode of revocation which was effectual under the old law—the Court, in the absence of evidence as to the date when the act of crossing out was done, refused to presume that it was before 1838, and therefore pronounced for the will (c).

(a) *Staines v. Stewart*, 2 S. & T. 320; 8 Jur. N. S. 440; 31 L. J. P. 10. (c) *Benson v. Benson*, L. R. 2 Prob. 172; 40 L. J. P. 1; 23 L. T. N. S. 709.
 (b) *Andrew v. Molley*, 12 C. B. N. S. 514.

CHAPTER III.

OF REVOCATION BY A SUBSEQUENT WILL OR CODICIL OR OTHER WRITING.

1. Prior to Statute of Frauds, wills were revocable by parol. The Statute provides that wills should only be revoked by writing, &c.
2. Provisions of the Act as to the revocation of wills of personalty.
3. Provisions of 32 Vict. c. 8, as to revocation.
4. Provisions of "The Wills Act, 1873," on same subject.
5. Statute 32 Vict. c. 8, applies 19th December, 1868.
6. A man may revoke his will as often as he pleases.
7. A will revoking a devise was required by Statute of Frauds to be attested as a devise. Distinction between mode of attesting a devise and a revoking will.
8. A letter, declaring an intention to revoke, is sufficient under the 22nd section of the Statute of Frauds.
9. Instructions may be a good revoking will.
10. Parol evidence may be given, notwithstanding the 22nd section, of a revoking will having been made which is not forthcoming.
11. A will of personalty may be revoked by a partially unfinished will. Rule laid down in Williams on Executors.
12. Such partially unfinished will, if it comprises realty and personalty, will scarcely be allowed to operate.
13. Presumption of law is adverse to an unfinished instrument revoking a will regular in form and regularly executed.
14. Circumstances under which parol evidence will or will not be received.
15. If the instrument is incomplete, it will not effect a revocation.
16. The revoking instrument must indicate a *present* intention to revoke.
17. Effect of a general revocatory clause.
18. An inconsistent disposition of previously devised property will revoke a will.
19. The Court will so construe both instruments as to give both effect, if possible, or as far as possible.
20. Rules laid down by Sir J. P. Wilde in *Lemage v. Goodban*.
21. Case of In the goods of *Lewis*.
22. A revocatory clause in a subsequent will does not necessarily revoke all prior testamentary papers. The *intention* of the testator will be looked at.
23. If the provisions of a subsequent will cannot be ascertained, the prior will remains unrevoked.
24. Difficulty of ascertaining the relative dates of testamentary papers. Water-mark not a safe guide.

25. If no evidence is given to determine the respective dates, both wills are void so far as they conflict.
26. The words "last will" are of no importance.
27. A revocation of a trusteeship conferred by a will does not revoke a guardianship or other office conferred by the will.
28. The provisions of a codicil not permitted to affect a will further than is actually necessary.
29. Case of *Farrer v. St. Catherine's College*.
30. A revocation, founded on a wrong assumption, is ineffectual.
31. A codicil may revive the prior of two wills by referring to it as existing. But this cannot be where the prior will has been destroyed.
32. The proof of a subsequent revoking will, not forthcoming, must be clear and distinct.
33. If the contents of the subsequent revoking will cannot be proved, both are void.
34. Distinction between a revoking will and a writing revoking a will.
35. Mode of executing a writing containing an intention to revoke. Provisions of 32 Vict. c. 8, and "The Wills Act, 1873," as to such a writing.

BOOK IV. 1. Prior to the passing of the Statute of Frauds, wills
 CHAP. III. and testaments were revocable by parol, though by the Statute 34 H. 8, c. 5, wills of real estate were required to be in writing (a). It was, however, provided by the 6th section of the Statute of Frauds (b) that "no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same (or by burning, &c.); but all devises and bequests of lands and tenements shall remain and continue in force (until the same be burnt, &c.); or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same."

2. By the 22nd section of the same Act, it was provided "that no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall //

(a) 1 Jarm. Wills, 155; Ex parte *Earl of Ilchester*, 7 Ves. 348; *Richardson v. Barry*, 3 Hagg. 249.
 (b) 29 Car. II. c. 3.

any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so by three witnesses at least."

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3. The Ontario Statute 32 Vict. c. 8, provides (a) that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed, or by burning," &c.

4. "The Wills Act, 1873," which applies to wills made after the 31st December, 1873, repeals the Statute 32 Vict. c. 8, as to such wills, and, by s. 17, provides that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (by marriage), or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, &c., with the intention of revoking the same" (b).

5. As the Statute 32 Vict. c. 8 was not passed until the 19th December, 1868, it will be necessary to consider particularly the state of the law before that date.

6. Concerning the making of a latter testament, so large and ample is the liberty of making testaments, that a man

(a) S. 5.
(b) The new Act does not extend to a revocation by will or other writing, of a will made before 1st January, 1874. See *Hobbs v. Knight*, 1 Curt. 768; 1 Williams Exors. 175. Such a will may, therefore, be revoked after that date by a will executed in the manner prescribed by 32 Vict. c. 8, s. 5. But that Act

provides that the revoking will or codicil must be executed according to law, and that the writing declaring an intention to revoke must be executed in the same manner as a will is by law required to be executed. The law referred to would, no doubt, be held to be the law in force at the time of the execution of the revoking instrument.

BOOK IV. may, as oft as he will, make a new testament even until
 CHAP. III. his last breath; neither is there any cautel under the
 sun to prevent this liberty. But no man can die with
 two testaments, and therefore the last and newest is of
 force; so that if there were a thousand testaments, the last
 of all is the best of all, and maketh void the former (a).

7. It will be observed that a will revoking a devise was, by the Statute of Frauds, required to be attested by the same number of witnesses as the devise itself; but a devise was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not; and a revoking will was required to be signed by the testator in the presence of the witnesses, which was not necessary to the due execution of a devise (b). This difference, however, has been attended with but little practical effect, inasmuch as a will is seldom made for the mere purpose of revoking another, but is usually intended to effect a new disposition of the testator's estate. If the proposed new disposition is defeated by reason of the defective execution of the new will, the latter is not generally allowed to have any revoking effect (c); whilst, on the other hand, if the new will is regularly executed, the later dispositions of themselves supplant or revoke the earlier (d).

8. The 22nd section of the Statute of Frauds, requiring only that the testator's intention to revoke should be reduced to writing and allowed by him, it has been held that a letter written by him to the person having the custody of the will, in the presence of the requisite number of witnesses, directing such person to destroy the

(a) Swinb. Pt. 7, s. 14, pl. 1.

(b) 1 Jarm. Wills, 156.

(c) See post, chapter on Depend-

ent Relative Revocation.

(d) 1 Jarm. Wills, 156.

will, is a sufficient revocation of the will, even though it was not destroyed in the lifetime of the testator (a). BOOK IV.
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9. As instructions for a will have been held to be a good will of personalty, such instructions may constitute a good revoking will. An unexecuted will, the draft of which had been read over to and approved by the deceased, has been admitted to probate, although it had remained unexecuted during the period of two months prior to the death of the testator (b). And in a case where a will was, during the testator's lifetime, drawn in pursuance of instructions, but the testator died before the will was brought to him, the Court held the will thus drawn to be a good revoking will of personalty, and admitted parol evidence to prove that what was written was in accordance with the instructions given by the testator (c).

10. The 22nd section of the Statute of Frauds does not preclude the admission of parol evidence of a second will having been made, inconsistent with the first, though the second will be not forthcoming (d).

11. A will of personal estate may be partially revoked by a subsequent unfinished will, which the testator has been prevented by the act of God from completing. The rule in England prior to the Statute 1 Vict. c. 26, as stated by Sir Edward Vaughan Williams (e), is: "That when there was a regular will, and another paper began as a new will, which the testator had been prevented by the act of God from finishing, the two papers might be taken together as the will of the deceased, and operation

(a) *Walcott v. Ochterlony*, 1 Curt. 580; 1 Jarm. Wills, 157.

(b) *Musto v. Sutcliffe*, 3 Phillim. 104; *Warburton v. Burrows*, 1 Add. 383; *Allen v. Manning*, 2 Add. 490.

(c) *Sellers v. Garnet*, cited by Sir G. Lee in *Helyar v. Helyar*, 1 Phil-

lim. 430; S. C. 1 Cas. temp. Lee, 509.

(d) *Helyar v. Helyar*, 1 Cas. temp. Lee, 472; *Brown v. Brown*, 8 E. & B. 876.

(e) 1 Williams Exors. 161, 162.

BOOK IV. *pro tanto* be given to the latter paper, provided the proof
 CHAP. III of final intention were clear, but it would not wholly
 revoke the former paper;" the unfinished paper is re-
 garded not as a codicil, but as a revocation as far as it
 goes, and to be taken in conjunction with the will. "If
 this principle," said Sir John Nicholl in *Ingram v. Strong*
 (a), "was rightly understood in other Courts, there would
 seldom be much question about cumulative legacies: for
 where a paper is codicillary, and two legacies are given to
 the same person, they are cumulative; where instructions
 are pronounced for as *containing together* a will (b), that
 is, where there is a complete will, and an instrument in-
 tended as an inception of a new will, but not completed,
 the latter legacy supersedes and revokes the former, and
 is substituted in the place of it" (c).

12. In analogy to the practice of the Court in dealing
 with unexecuted papers, which profess to dispose of both
 realty and personalty, and are of course an ineffectual
 disposition of the latter, it is laid down that, where there
 is a regularly executed paper disposing both of real and
 personal estate, and an unexecuted paper of later date, in
 which the disposition of real and personal estate is
 blended, so that the realty and personalty are dependent
 on each other (as where the testator gives real property
 to A., because he has given personal property to B.), the
 Court will not grant probate of such unexecuted paper
 for it would defeat the intention, and be injustice, to gi-
 ve effect to the one disposition, unless it could be given
 to the other. But where it is clearly shown that the testa-
 tor has finally made up his mind, and that the execution of
 the latter instrument was prevented by the act of God,

(a) 2 Phillim. 312.

(b) See ante.

(c) See also 4 Hagg. 198, per
 Curiam; *Waleh v. Gladstone*, 1 Phil-

lim. 294; *Kidd v. North*, 2 Phillim.
 91; *Brine v. Ferrier*, 7 Sim. 64; 1
 Williams Exors. 162, 163.

and the devise of the realty is perfectly independent of the disposition of the personalty, the Court will give effect to the unexecuted will in order to carry the deceased's intention *pro tanto* into effect (a). BOOK IV.
CHAP. III.

13. The presumption of law is always adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instruments. To establish such a paper, there must be the fullest proof of capacity, volition, final intention, and interruption by the hand of God (b).

14. It has been decided under the 22nd section, that evidence cannot be received of the testator's intention, orally announced, to adopt the prior of two wills, both of which were found at his decease uncanceled, though it appeared that most of the bequests in the posterior will had lapsed (c). But the Act does not preclude the reception of evidence of acts of the testator in his lifetime concerning testamentary papers, nor does it exclude inquiry into the state in which such papers were found at his decease (d).

15. If the instrument containing a clause revoking a will of personalty is incomplete, and shows on its face that the testator had not fully executed it, the same rule applies to it as to a will left in such incomplete state. It cannot operate as a definitive expression of the testator's purpose of revocation. These remarks apply only to the

(a) *Tudor v. Tudor*, 4 Hagg. 199, note (a). See also *Reynolds v. White*, 2 Cas. temp. Leo, 214; *Reeves v. Glover*, *ibid.* 359; *Douglass v. Smith*, 3 Knapp, 1; *Ellden v. Ellden*, 4 Hagg. 183; *Gillow v. Bourne*, 4 Hagg. 192; 1 Williams Exors. 163, 164.

(b) *Blewitt v. Blewitt*, 4 Hagg. 410; 1 Williams Exors. 165.

(c) 1 Jarm. Wills, 157; *Daniel v. Nockolds*, 3 Hagg. 777.

(d) 1 Jarm. Wills, 157.

BOOK IV. revocation of wills of personalty prior to the recent
CHAP. III. Act (a).

16. It is a well-established rule that a revocation, to be effective, must indicate a *present*, and not merely a future intention to revoke (b). Where the testator, in a subsequent will (having by that and his former will disposed of all his real estate), said, "As to the rest of my real and personal estate, I intend to dispose of the same by a codicil hereafter to be made to this my will," this was held no revocation of the provisions of his former will in regard to the disposition of his real estate (c).

17. A general revocatory clause of all former wills leads to the inference that the deceased at that time intended to leave a subsisting will (d).

18. A disposition of previously devised property, inconsistent with the prior devise, will, equally with an express revocation, revoke the previous disposition (e). Thus, in a late case, when a person duly executed two testamentary instruments of different dates, appointing the same persons executors, but nominating different residuary legatees, the later instrument, though it did not in terms revoke the former, was alone admitted to probate (f). When, however, there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a subsequent inconsistent disposition, to prove

(a) 1 Jarm. Wills, 157.

(b) *Clebury v. Becket*, 14 Beav. 588; 1 Jarm. Wills, 158.

(c) *Thomas v. Evans*, 2 East. 488. See also *Griffin v. Griffin*, in note to *Mathews v. Warner*, 4 Ves. 197; 1 Jarm. Wills, 158.

(d) *Marsh v. Marsh*, 1 S. & T. 528; 6 Jur. N. S. 380.

(e) 1 Jarm. Wills, 159. *Moorhouse v. Lord*, 9 Jur. N. S. 677; 32 L. J. Ch. 295, 8 L. T. N. S. 212; 10 H. L. C. 272; *Wallace v. Seymour*, 20 W. R. 634; 6 Ir. Rep. C.

L. 219, 343, Ex. Cham. The words "I give, devise and bequeath to A. and B. all the residue of my real and personal estate whatsoever and wheresoever undisposed of by my will, and this codicil thereto," revoke an intermediate codicil. In the goods of *Hastings*, 20 W. R. 616; 26 L. T. N. S. 715.

(f) *Pepper v. Pepper*, 5 Ir. Rep. Eq. 85, Prob. See also in the goods of *Howard*, L. R. 1 Prob. 636; 20 L. T. N. S. 230.

that the intention to revoke is equally clear and manifest. If there is only a reasonable doubt, the first devise ought to stand (a). BOOK IV.
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19. And the Courts are careful to adopt such a construction of the two wills as may give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the later paper, assuming, of course, that such later paper contains no express clause of revocation, or other clear indication of a contrary intention (b).

20. In *Lemage v. Goodban*, above referred to, the principle on which the Court acts in construing two or more testamentary papers left by the same testator is clearly stated by Sir J. P. Wilde. He says (c), "The case of *Plenty v. West* (d), so far as it supports the doctrine that the use of the words 'last will' in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto v. Gilbert* (e), and *Stoddart v. Grant* (f); and the case of *Henfrey v. Henfrey* (g) only decides that a second will, disposing of the whole estate, revokes a former disposition. Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this Court has to exercise the functions of a Court of construction. The principle applicable is well

(a) *Hearle v. Hicks*, 1 C. & F. 20; 8 C. in C. P.; *Doe d. Hearle v. Hicks*, 8 Bing. 475; 1 M. & Scott 759, and Ex. Cham. 1. Y. & J. 470, affirmed. See also *Leslie v. Leslie*, 6 Ir. Rep. Eq. 332, Proh.

(b) 1 Jarm. Wills, 161; 1 Williams Exors. 156; *Sandford v. Vaughan*, 1 Phillim. 39; *Plenty v. West*, 1 Rob. 264; 16 Beav. 173; *Lemage v. Goodban*, L. R. 1 Prob. 57; 12 Jur. N. S. 32; 35 L. J. P. 28; 13 L. T. N. S. 506; *Robertson v. Powell*, 2 H. & C. 762; 10 Jur. N. S. 442; 33 L. J. Exch. 34; *Doe d. Spencer v. Pedley*, 1 M. & W. 662; *Geaves v. Price*, 32

L. J. P. 113; 11 W. R. 809; *Roe d. Snape v. Neville*, 11 Q. B. 466; In the goods of *De La Saussaye*, L. R. 3 Prob. 42. Where the first will disposed of realty and personality, and the second disposed of personality only, but contained a general revocatory clause, the first will was held to be revoked; *Cottrell v. Cottrell*, L. R. 2 Prob. 397; 41 L. J. P. 57; 20 W. R. 590; 26 L. T. N. S. 527.

(c) At p. 61.

(d) 1 Rob. 264.

(e) 9 Moo. P. C.

(f) 1 Macq. 163.

(g) 4 Moo. P. C.

BOOK IV. expressed in Mr. Justice Williams' book on *Executors*.
 CHAP. III He says: 'The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the former, *as to those parts only* where they are inconsistent, (a). This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now, it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the Court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the intention to be sought and discovered relates to the disposition of the testator's pro-

(a) 1 Williams Exors. 156.

perty, and not to the form of his will. What dispositions did he intend—not which, or what number of, papers did he desire or expect to be admitted to probate—is the true question. And so this Court has been in the habit of admitting to probate such and as many papers, all properly executed, as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

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21. In a recent case, where a testator left two testamentary papers, in the earlier of which was an appointment of executors, but in the later of which he disposed of his whole property in a manner at variance with the dispositions made in the earlier paper, omitting to appoint executors, or to revoke the former appointment, the Court included both papers in the probate (*a*).

22. It has been held that, notwithstanding a revocatory clause contained in a subsequent will, a paper, prior in date to that will, will not be revoked if the Court is satisfied that it was not the testator's intention to revoke the legacy or benefit contained in the paper (*b*). Where there is an express and unqualified bequest in a will, and there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift will take effect (*c*).

23. Where the provisions of a subsequent will cannot be ascertained in consequence of its loss, the prior will was held to be unrevoked (*d*); and where the jury found

(*a*) In the goods of *Lewis*, 19 W. R. 1038; 25 L. T. N. S. 510.

(*b*) *Denny v. Barton*, 2 Phillim. 575; *Gladstone v. Tempest*, 2 Curt. 650; *Doe d. Evers v. Ward*, 16 Jur. 709; 21 L. J. Q. B. 145; 18 Q. B. 197.

(*c*) *Kerr v. Clinton*, L. R. 8 Eq. 462; 17 W. R. 980.

(*d*) *Hitchings v. Bassett*, 3 Mod. 203; S. C. Comb. 90.

BOOK IV. that there was a second will containing dispositions different from the dispositions contained in a former will, but in what particular was unknown to them, and they did not find that the testator had cancelled the second will, or that the devisee under the first will destroyed the same, but what became of the second will they could not tell, it was held that the second will was no revocation of the first (a).

24. It is frequently difficult, from wills not being dated, to ascertain the time of their execution, so as to determine which of several testamentary papers left by the testator was the latest, and resort is had to other circumstances in order to determine the respective dates. The water-mark of the paper may be consulted, though it is not a safe guide, as paper made in one year sometimes bears the date of the following year (b). In a late case, where two wills bore the same date, and were similar in substance, but different in language, there being no extraneous evidence to determine which was last executed, the Court acted upon the internal evidence afforded by the wills themselves, and granted probate of one only (c).

25. If no evidence can be obtained to determine the respective dates, both wills are held void, in so far as they conflict with each other, the property, which is the subject of the conflicting dispositions, going as in a case of intestacy; but this unsatisfactory expedient is not resorted to until all attempts to educe from both papers a scheme of disposition consistent with both, has been tried in vain (d).

(a) *Goodright v. Harwood*, 3 Wils. 497; S. C. 2 Black, 937; Cowp. 8, n. See also *Dickinson v. Stidolph*, 11 C. B. N. S. 357; *Cutto v. Gilbert*, in appeal, 9 Moo. P. C. 131; *Freeman v. Freeman*, 5 D. M. & G. 704; *Birks v. Birks*, 34 L. J. P. 90.

(b) 1 Jarm. Wills, 160.

(c) In the goods of *Stephens*, 22 L. T. N. S. 727; 18 W. R. 523.

(d) 1 Jarm. Wills, 160; *Phipps v. Earl of Anglesea*, 7 B. P. C. 100; 443; 1 Williams Exors. 160.

26. The words "last will," contained in a testamentary instrument, are not of themselves sufficient to constitute it the last will of the testator (*a*); and indeed, in deciding whether a later will containing these words revokes an earlier will, they have lately been held to be entitled to no weight whatever (*b*).

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27. Where the same person is by will appointed to more than one office, as where he is appointed guardian, trustee or executor, a revocation of the office in one particular will not operate to revoke the other offices (*c*), unless it is apparent from the will that these appointments were intended to be united in the same person (*d*).

28. The provisions of a codicil are not permitted to affect the dispositions of the will farther than is absolutely necessary for the purpose of giving effect to the codicil (*e*). And where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil (*f*).

29. In a late case (*g*) the question arose as to the effect

(*a*) *Pepper v. Pepper*, 5 Ir. R. Eq. 85, Prob.

(*b*) *Leslie v. Leslie*, 6 Ir. Rep. Eq. 332, Prob.

(*c*) *Ex parte Park*, 14 Sim. 83; *Graham v. Graham*, 16 Beav. 550; *Cartwright v. Shephard*, 17 Beav. 301; *Worley v. Worley*, 18 Beav. 58; *Hare v. Hare*, 5 Beav. 628.

(*d*) *Barrett v. Wilkins*, 5 Jur. N. S. 687.

(*e*) 1 Jarm. Wills, 162; *Duffield v. Duffield*, 3 Bli. N. S. 261; 1 D. & Cl. 268, 396; *Beckett v. Hardin*, 4 M. & Sel. 1; *Young v. Hassard*, 1 Dr. & War. 638; *Fry v. Fry*, 9 Jur. 886; *Lushington v. Boldero*, G. Coop. 216; *Clarke v. Butler*, 1 Mer. 304; *Doe d. Murch v. Marchant*, 6 M. & Gr. 813; 7 Scott, N. S. 644; *Douglas v. Leake*, 5 L. J. N. S. Ch. 25; *Earl of Hardwicke v. Douglas*, 7 Cl. & F. 795; *West P. C.* 555; *Inglefield v. Cogan*, 2 Col. 247; *Evans v.*

Evans, 17 Sim. 108; *Newman v. Lade*, 1 Y. & C. C. 680; *Barry v. Crundall*, 7 Sim. 430; *Froggart v. Wardell*, 3 De G. & S. 685. To words used by the testator in a peculiar sense in his will, the same sense will usually be ascribed in a codicil to the will: 1 Jarm. Wills, 165; *Evans v. Evans*, 17 Sim. 86.

(*f*) 1 Jarm. Wills, 168; *Goblet v. Beechey*, 3 Sim. 24; 2 Russ. & M. 624; *Gordon v. Hoffman*, 7 Sim. 29; *Mann v. Fuller*, Kay, 624; *Pratt v. Pratt*, 14 Sim. 130; *Bunny v. Bunny*, 3 Beav. 109; *Savory v. Rumney*, 5 De G. & Sm. 698; *Stokes v. Heron*, 12 Cl. & F. in 161; *Cleobury v. Beckett*, 14 Beav. 583. But see *Read v. Backhouse*, 2 Russ. & M. 546; *Filcher v. Hole*, 7 Sim. 208; *Carrington v. Payne*, 5 Ves. 423.

(*g*) *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19.

BOOK IV. upon a prior codicil, of a codicil revoking a will. Lord
 CHAP. III. Selborne observes (a): "I think the cases of *Bunny v. Bunny* (b) and *Pratt v. Pratt* (c) are sufficient authorities to show that where a testator begins by distinguishing between his last will and a codicil to it, and purports to revoke his last will only, not referring to any previous codicil, that the revocation is not to be carried further than the necessity of the terms which he has used may require, and it is in accordance with the well-known principles of the case of *Doe v. Hicks* (d) that a clear gift is not to be revoked except by clear words. I hold, therefore, although it is perfectly true that the word 'will,' used abstractedly from the context, carries all testamentary instruments which together make the will of the testator, yet here, where you have the context which expressly distinguishes the last will from the codicil, you are not to infer that all previous codicils are revoked, because he revokes the last will, and still less to do so where reference is made to the will apparently as a particular instrument, and that is an inaccurate reference."

30. Where, by a codicil, a devise or bequest in a will or a previous codicil is revoked by the testator, who grounds such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being, it is considered, conditional and dependent on a contingency which fails (e).

31. Sometimes a codicil has the effect of impliedly revoking the posterior of two wills, by expressly referring to and recognizing the prior one as the actual and subsisting

(a) At p. 23.
 (b) 3 Beav. 109.
 (c) 14 Sim. 129.
 (d) 8 Bing. 475.

(e) 1 Jarm. Wills, 170; *Campbell v. French*, 3 Ves. 321; *Evans v. Evans*, 10 A. & E. 228; *Atty.-Gen. v. Lloyd*, 1 Ves. 32.

will of the testator (a). But if the prior will has been destroyed, it cannot be thus revived. Thus, in *Rogers v. Goodenough* (b), the testator made his will in 1858, by which all former wills were expressly revoked. He made another in 1859, slightly altering the dispositions of his estate. After the will of 1859 was executed, the will of 1858 was destroyed by burning. In 1860 he made a codicil, which began by expressing a desire to have it treated as a codicil to his will of 1858, but it contained no other words of confirmation or revocation, and contained no other provision, except the wish to have it treated as a codicil to the will of 1858, which was not equally applicable to the will of 1859; it was held that, as the will of 1858 was not in writing at the time of the execution of the codicil, it could not be revived by or incorporated into it, or be admitted to probate; and it was held also that, as the codicil of 1860 did not expressly revoke the will of 1859, or dispose of the estate contrary to its provisions, that will, together with the codicil, must be admitted to probate (c).

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32. Where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will, which is not forthcoming, the evidence should be clear and conclusive, not only as to the execution, but as to the contents of the missing instrument (d).

33. And where a will was found after the testator's death, but parol evidence was given that he had executed a subsequent will which contained a clause of revocation,

(a) 1 Jarm. Wills, 175; *Lord Walpole v. Earl of Orford*, 3 Ves. 402; *Payne v. Trappes*, 11 Jur. 854; 1 Rob. 583; In the goods of *Chapman*, 8 Jur. 902; 1 Rob. 1.

(b) 2 S. & T. 342; 8 Jur. N. S. 391; 31 L. J. P. 49; 5 L. T. N. S. 719.

(c) An inaccuracy in regard to the date of the will referred to was held

not material, unless it created doubt as to which of the two wills was referred to: 1 Jarm. Wills, 175; *Jansen v. Jansen*, cited in 1 Add. 39; *Thomson v. Hempenstall*, 1 Rob. 783; 13 Jur. 814.

(d) *Berthon v. Berthon*, 18 L. T. N. S. 301; 16 W. R. 673.

BOOK IV. and which remained in his custody until his death, and
 CHAP. III. could not then be found, and that he had declared an intention to destroy it, it was held that he died intestate (a).

34. The distinction between a revoking will, and a mere writing revoking a will, as a means of revocation, deserves attention. The former is entitled to probate, the latter is not (b). In a late case, the testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it. The Court held that the letter was a writing duly executed, declaring an intention to revoke the will, and the letter being also testamentary, it was admitted to probate (c).

35. A mere writing, declaring an intention to revoke a will, as distinguished from a will containing a revoking clause, was required by the old Statute to be executed in the presence of three or four witnesses, but no further ceremony was made necessary for its validity, such as was required for the due execution of a will. It will be observed that by the recent Statute of this Province, 32 Vict. c. 8, such a writing is required to be executed in the manner in which a will is by law required to be executed (d). In order to revoke a will of real estate it must therefore be duly executed with all the formalities necessary to the validity of a will of real estate; but as a will of personal estate does not require signature or attestation, neither does a writing revoking such a will. But a

(a) *Wood v. Wood*, L. R. 1, Prob. 309; 15 L. T. N. S. 593; 36 L. J. P. 34.

(b) In the goods of *Fraser*, L. R. 2 Prob. 40; In the goods of *Hicks*, L. R. 1 Prob. 683; 38 L. J. P. 65; 21 L. T. N. S. 300.

(c) In the goods of *Durance*, L. R. 2 Prob. 406; 41 L. J. P. 60; 20 W. R. 759; 26 L. T. N. S. 983.

(d) See s. 5.

writing revoking a will under the provisions of "The Wills Act, 1873," must be executed with the formalities prescribed by the Act for the due execution of wills.

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CHAPTER IV.

OF THE ALTERATION OF A WILL BY OBLITERATIONS, INTERLINEATIONS, &c.

1. Wills of personal estate may, by the present law, be altered by unattested interlineations. Otherwise as to wills of real estate.
2. Obliterations were authorized by the Statute of Frauds as a means of total or partial revocation.
3. Opinion of Baron Parke in *Locke v. James*.
4. The striking out of one devisee's name is a revocation *pro tanto* only.
5. Case of *Short v. Smith*.
6. Provisions of 1 Vict. c. 26, as to alterations.
7. Construction to be placed on s. 2 of "The Wills Act, 1873."
8. The cases decided under the English Act, as to wills of personalty, have only a limited application to wills of realty in this Province.
9. Alterations in a will may be in pencil, but pencil alterations in a will written in ink are considered deliberative.
10. Alterations are presumed to have been made after the execution of the will.
11. And where there is a codicil which does not notice them, after the execution of the codicil.
12. Rule as to presumptive date of alterations laid down by Privy Council in *Greville v. Tylee*.
13. Slight evidence is sufficient to rebut the presumption that alterations in a will were made after the execution.
14. Evidence of parol declarations may be admitted to establish interlineations as part of a will.
15. The rule as to the presumptive date of mutilations the same.
16. The words "otherwise destroying," in the 17th section of "The Wills Act, 1873," explained.
17. Scientific means may be used to decipher unattested obliterations.
18. The doctrine of dependent relative revocation is applicable to alterations in a will.
19. Example of insufficient attestation of alterations in a will.

BOOK IV. 1. As wills of personal estate do not require to be signed or attested, neither signature nor attestation is necessary to the validity of alterations made therein after the

making of the will (a). It is otherwise, however, as to alterations of wills of real estate. Such wills being required by the Statute of Frauds to be signed and attested with much solemnity, there would have been a manifest inconsistency in permitting additions by way of interlineations, made after execution, to form part of the will, without a re-execution or re-publication of the instrument.

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2. Obliteration was authorized by the Statute of Frauds as a means of *total* or *partial* revocation. An unattested obliteration, therefore, operates as a revocation *pro tanto* (b); unless it is directly connected with a substituted interlineation, which is ineffectual, in which event the Courts usually apply the doctrine of dependent relative revocation so as to preserve the obliterated devise (c). Thus, where a testator, by his will duly executed, devised certain real estates to R. N. in fee, subject to and charged with an annuity of 600*l.* a year, which he gave to his daughter, E. J., for her life, with powers of distress and entry on the devised estates, in case the annuity were in arrear, and he subsequently erased with a pen the word "six," and inserted over it the word "two," leaving, however, the word "six" legible in each place where it occurred, and on the same day he added a memorandum or codicil to his will, signed by him in the presence of one witness only, recognizing the above alterations; it was held that the substitution of the word "two" for "six" was under these circumstances inoperative (d).

3. Parke, B., said: "It was not, and indeed could not

(a) *Martins v. Gardiner*, 8 Sim. 73; *Ravenscroft v. Hunter*, 2 Hag. 68; *Mence v. Mence*, 18 Ves. 348. See also as to revocation *pro tanto*, *Swinb. P. 7*, s. 16, pl. 4; *Sutton v. Sutton*, Cowp. 812; *Humphreys v. Taylor*, 7 Gwillim, s. Bac. Abr. 363; *Scrubby v. Fordham*, 1 Add. 78.

(b) *Larkins v. Larkins*, 3 B. & P. 16.

(c) See post, chapter on Dependent Relative Revocation.

(d) *Locke v. James*, 11 M. & W. 901.

BOOK IV. have been disputed, but that if the annuity had been
CHAP. IV. charged on the real estate only, then neither the erasure
nor the codicil would have affected it. The erasure
would have had no effect, because the testator did not
mean to destroy the annuity of 600*l.* per annum in any
other way than by substituting for it an annuity of 200*l.*
per annum. The substitution in the will was inoperative,
having been made after the subscription of the witnesses,
not in their presence, and without re-publication ; and the
substitution, for the purpose of giving effect to which the
erasure was made, thus failing, the law is clear that the
erasure fails also. It is treated as an act done by mere
mistake, *sine animo cancellandi*. What the testator in
such a case is considered to have intended is a complex
act—to undo a previous gift, for the purpose of making
another gift in its place. If the latter branch of his inten-
tion cannot be effected, the doctrine is, that there is no
sufficient reason to be satisfied that he meant to vary the
former gift at all. The codicil or memorandum, being un-
attested, clearly could have no effect on the disposition of
the real estate.”

4. Where a testator, having duly executed a devise of
lands to several trustees as joint tenants in fee, and after-
wards, having struck out the name of one of the devisees—
by drawing a pen through it, a case was sent from the
Court of Chancery for the opinion of the Court of Com-
mon Pleas ; Lord Alvanley said, “ Whatever the altera-
tion might be, it was not an alteration arising from a
new gift, but merely from a revocation. If the remain-
ing devisees were to acquire any estate which they had
not before, something beyond a mere revocation would be
necessary. If, therefore, the devisees had been tenants
in common, upon the erasure of one name the remaining
two would take no more than two-thirds of the estate.”

It was certified that the devise of the estate to the two trustees to whom, together with the third trustee, the estate was devised as joint tenants in trust, to be sold, was not revoked by the testator having struck out the name of the third trustee after the execution of the will (a).

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5. And where a testator devised lands to two trustees in trust for certain purposes, and he afterwards made several alterations in the will, and struck out the name of one of the trustees, and inserted the names of two others, but did not republish his will; it was held that the alteration should operate as a revocation *pro tanto* as to the trustee whose name was obliterated, leaving the devise good as to the old trustee whose name was retained; Lord Ellenborough observing, that "the facts of the case plainly showed that the testator had no object but to change his trustee; that it would be unreasonable, when he had not indicated any intent to dispose of his lands to different purposes than those declared by his will, and when it clearly appeared that he meant to disinherit his heir-at-law, to infer that he designed that his will should become inoperative, and so let in his heir-at-law. It was better to conclude that he thought he had by the alterations introduced made a valid disposition of his estate to the new trustees, and that he had no design to alter his will except so far as such obliteration or interlineation could effectuate that purpose, by substituting the persons whose names he interlined in the stead of him whose name was struck out" (b).

6. In England, by the Statute 1 Vict. c. 26, it is provided (c) "That no obliteration, interlineation, or other

(a) *Larkins v. Larkins*, 3 B. & P. 16; *Winsor v. Pratt*, 2 Br. & B. 650.
(b) *Short v. Smith*, 4 East. 419.

See also *Sutton v. Sutton*, Cowp. 812.
(c) S. 21.

BOOK IV. alteration made in any will after the execution thereof,
CHAP. IV. shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." This section has been introduced without alteration into, and forms the 18th section of "The Wills Act, 1873;" but the old law, as it existed in England prior to the passing of the Act 1 Vict. c. 26, is still in force in this Province.

7. It might fairly be inferred from the wording of the 2nd section of "The Wills Act, 1873," which provides that, unless therein otherwise expressly provided, the Act shall not extend to any will made before the 1st January, 1874, that any will made before that date might be altered after that date in any manner permitted by the law as at present in force. But that does not appear to be the construction placed upon the 34th section of the English Act, which is similar in its provisions to the 2nd section of our Act. Regarding the 34th section of the English Act, Sir E. V. Williams remarks (a): "The 34th section of the new Statute enacts, that 'this Act shall not extend to any will made before the 1st day of January, 1838.' And certainly these words are of very general import, and seem to leave all wills made before January, 1838, in the same

(a) 1 Williams Exors. 125.

situation as if the Act had not passed, and to be dealt with in all respects, with regard to execution, revocation, or alteration, according to the law as it then stood; and if this were the true construction, a testator whose will was in existence before January, 1838, if he should live for fifty years after that date, might at any time during his life revoke the will by any of the modes which were effectual according to the old ecclesiastical law, or make alterations in it to any extent, or at any period, without regard to the exigencies of the Statute of Victoria. But the interpretation of the Act which has been adopted by the Prerogative Court, and approved by the Privy Council, is that the operation of the Act was meant only to be suspended with respect to the execution of such wills as were already made at the passing of the Act, and those made between the passing of the Act and the 1st of January, 1838, and that a will made before the Statute came into operation is not exempted from the necessity of complying with the provisions of the new law *with respect to any act done to it after that period*" (a). Assuming that the same construction would be placed by the Courts on "The Wills Act, 1873," it follows that the provisions of the 18th section of that Act, will be operative as to all wills after the 31st December, 1873.

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8. The principles established by the cases decided under the late English Act with reference to alterations in wills of personalty, have only a limited application to the same class of wills in this Province; but they apply, it is conceived, in many respects to alterations in wills of real estate, and they will apply to alterations in wills of

(a) In the goods of *Livock*, 1 Curt. 906; *Hobbs v. Knight*, 1 Curt. 768; *Brooke v. Kent*, 3 Moo. P. C. 334; *Ferraris v. Hertford*, 3 Curt. 468, 512, 513; *Croker v. Hertford*, 4 Moo. P. C. 339, 356. See also 1 Jarm. Wills, 134; *Andrews v. Turner*, 3 Q. B. 177.

BOOK IV. either real or personal estate made after the new Act
 CHAP. IV. comes into force.

9. Alterations in a will may be made in pencil as well as in ink (*a*); but if the original will is written in ink, the usual presumption will arise that such alterations are merely deliberative and not final, and effect will not be given to them (*b*). In a recent case the testator had executed a will and codicil. At some time after the execution of the will, but before that of the codicil, he, with a pencil, struck through several paragraphs of his will, and made his initials on the margin. He also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter, the will; but the Court held that the alterations were only deliberative and not final, and were not included in the confirmation of the codicil (*c*).

10. It has been laid down that, contrary to the rule in the case of deeds and other instruments, it will not be presumed that interlineations and erasures appearing on the face of a will, either of real or personal estate, were made before the will was executed (*d*). In the case of *Williams v. Ashton* (*e*), Sir W. P. Wood considered that the rule, as thus stated, was not strictly correct. "The correct view," said he, "is that the *onus* is cast upon the party who seeks to derive an advantage from an altera-

(*a*) *Colvin v. Fraser*, 2 Hagg, 327; and see *Wynn v. Heveningham*, 1 Coll. 638, 639.

(*b*) *Francis v. Grover*, 5 Hare, 39; but see *Mence v. Mence*, 18 Ves. 348. See as to the effect of alterations which appear to be only cursory or deliberative, *Parkin v. Bainbridge*, 3 Phillim. 321; *Lavender v. Adams*, 1 Add. 409; In the goods of *Rolls*, 2 Add. 316; *Martins v. Gardiner*, 8 Sim. 73.

(*c*) In the goods of *Hall*, L. R. 2 Prob. 256; 40 L. J. P. 37; 25 L.T. N. S. 384.

(*d*) *Simmons v. Rendall*, 1 Sim. N.

S. 115; *Doe d. Shallcross v. Palmer*, 15 Jur. 836; 20 L. J. Q. B. 367; 16 Q. B. 747; In the goods of *White*, 6 Jur. N. S. 808; *Williams v. Ashton*, 1 J. & H. 115; *Banks v. Thornton*, 11 Hare, 180; *Doe d. Tatham v. Cuttmore*, 16 Q. B. 745; 20 L. J. Q. B. 364; *Cooper v. Bockett*, 10 Jur. 931; 4 Moo. P. C. 419; *Burgoyne v. Showler*, 1 Rob. 10; 8 Jur. 814; *Greville v. Tylee*, 7 Moo. P. C. 320; *Lushington v. Onslow*, 12 Jur. 465; *Gann v. Gregory*, 3 D. M. & G. 777.

(*e*) 1 J. & H. 115.

tion in a will, to adduce some evidence from which a jury might infer that the alteration was made before the will was executed. I do not consider that the Court is bound to say that it will presume such alterations to have been made either before or after execution. With regard to a will, I do not see any necessary presumption of the kind" (a).

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CHAP. IV.

11. Where there is a codicil to the will which takes no notice of the alterations, the presumption is that they were made after the date of the codicil (b). To rebut this presumption, alterations and obliterations made after the execution of the will and codicil should be referred to and identified in the codicil, or be proved to have existed before the date of the codicil (c). Under "The Wills Act, 1873," if the alterations are not shown to have existed before the date of the codicil, they should not be admitted to probate (d). The mere circumstance of the amount or name of a legatee being inserted in different ink and in different handwriting from the rest of the will, does not constitute an obliteration, interlineation, or other alteration within the new Statute; nor does any presumption arise against a will being duly executed as it appears. The case is different, however, where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing; under such circumstances, the *onus probandi* lies upon the party who alleges such alteration to have been made *prior* to execution, to prove by extrinsic evidence that the words were inserted before

(a) See also the remarks of Sir J. Hannen in the goods of *Sykes*, L.R. 3 Prob. 27.

(b) 1 Redf. Wills, 316-317; *Rowley v. Merlin*, 6 Jur. N. S. 1165; *Christmas v. Whinyates*, 9 Jur. N. S. 283; 3 S. & T. 81; 32 L. J. P. 73; 8 L. T. N. S. 801.

(c) In the goods of *Mills*, 11 Jur. 1070; In the goods of *Parker*, 27 L. T. 18; In the goods of *Mogg*, 1 No. Cas. 325; In the goods of *Wyatt*, 2 S. & T. 494; 10 W. R. 783.

(d) In the goods of *Bradley*, 5 No. Cas. 95, 186; *Sweete v. Pidsley*, 6 No. Cas. 189.

BOOK IV. execution, and that they had the sanction of the testa-
 CHAP. IV. tor (a). Where, however, a will was drawn up with
 blanks, as for the names of legatees and the amounts of
 legacies, which blanks were found filled up partly in black
 and partly in red ink, but there was no evidence to show
 when it was done, but the envelope containing the will
 had been opened and resealed, the former were presumed
 to have been filled up before the execution, the latter after
 the execution of the will (b).

13. The presumption of law that the interlineations in
 a will were made after execution, prevails only in the
 absence of evidence to the contrary, and very slight
 affirmative evidence is sufficient to rebut the presump-
 tion (c). And the Court is not bound in all cases to pre-
 sume that interlineations were made after the date of the
 will. Thus, when a will contained several unattested
 interlineations, most of them of single words, each of which
 was required to complete the sentence to which it
 belonged, and the interlined words were apparently writ-
 ten with the same ink and at the same time as the rest of
 the will, but at the time of execution the body of the will
 was covered up by the testatrix, so that the witnesses
 could not see whether the interlineations were there or
 not; the Court, referring to *Cooper v. Bockett* (d), held
 that, notwithstanding the absolute terms in which the
 rule was laid down in that case, the Court was not bound
 to presume that these interlineations were made after
 execution, and included them in the probate. Sir J.
 P. Wilde remarked, "I think there is a marked distinction
 between interlineations and alterations. Interlineations
 are generally used to complete an imperfect sentence,

(a) *Greville v. Tylee*, 7 Moo. P.
 C 320.

(b) *Birch v. Birch*, 1 Rob. 775; 12
 Jur. 1067. But see *In the goods of*

Bacon, 3 No. Cas. 645.

(c) *In the goods of Duffy*, 5 Ir.
 Rep. Eq. 506, Prob.

(d) 4 Moo. P. C 419.

whilst an alteration is a change in the original disposition. * * * * I conceive that the Court is not precluded, by the absence of direct evidence of the fact, from considering the nature of the interlineations, and the internal evidence, if any, furnished by the document itself" (a).

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14. Evidence of parol declarations of the testator before, but not after, the date of the execution of the will, may be admitted to establish undated interlineations as part of the will (b). In a recent case (c) the deceased executed a will and a codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The Court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor.

15. The same rule applies regarding the presumptive date of mutilations, as to the date of alterations in a will. If no evidence can be given as to the time when they were made, it will be presumed that they were made after the execution of the document in which they appear; and if there is a subsequent codicil or testamentary paper, after the execution of that codicil or paper (d).

16. The attention of the reader has already been called to the words (e) "otherwise destroying," contained in the 17th section of "The Wills Act, 1873;" and it has been shown that these words were not intended to include obliteration or

(a) In the goods of *Cadge*, L. R. 1 Prob. 543; 37 L. J. P. 15; 17 L. T. N. S. 484; In the goods of *Swinden*, 2 Rob. 192. But see in the goods of *Gausson*, 16 W. R. 212; 17 L. T. N. S. 354. For cases in which the Court presumed the alterations to have been made before execution see *Keigwin v. Keigwin*, 3 Curt. 607; 7 Jur. 840; In the goods of *Merton*, 13 Jur. 1108; In the goods of *Hindmarsh*, L. R. 1 Prob. 307; 36 L. J. P. 24.

(b) In the goods of *Foley*, 25 L. T. 311; *Doe d. Shallcross v. Palmer*, 16 Q. B. 747; 20 L. J. Q. B. 367.

(c) In the goods of *Sykes*, L. R. 3 Prob. 26.

(d) *Christmas v. Whinyates*, 9 Jur. N. S. 283; 3 S. & T. 81; 32 L. J. P. 73; 8 L. T. N. S. 801; *Rowley v. Merlin*, 6 Jur. N. S. 1165.

(e) See chapter on Revocation by Burning, &c.

BOOK IV. cancellation, so as to make these acts a revocation *pro tanto*
 CHAP. IV. under the 17th section of the Act (a). Obliterations are
 dealt with by the 18th section of the new Act, by which
 it is provided that no obliteration should be valid or have
 any effect, except so far as the words or effect of the will
 before such alteration shall not be apparent, unless
 such alteration shall be executed in the same man-
 ner as a will. The wording of this section implies that if
 the obliteration is so complete as to render the obliterated
 part illegible, the obliteration will be an effectual
 revocation *pro tanto*. It was the intention of the Legis-
 lature in this respect, that if a testator shall take such
 pains to obliterate certain passages in his will, and shall
 so effectually accomplish his purpose that those passages
 cannot be made out on the face of the instrument itself,
 it shall be a revocation as good and valid as if done
 according to the stricter forms mentioned in the Act of
 Parliament (b).

17. Glasses or other scientific means may be used for
 the purpose of ascertaining the words which have been
 obliterated, if the obliteration has not been duly exe-
 cuted (c); but the Court is not at liberty to receive evi-
 dence *dehors* the will itself, such as a draft copy or in-
 structions for the will (d). If the words obliterated can-
 not be distinguished by an inspection of the will, they
 must be omitted from the probate (e).

18. When a provision in a will is erased so as to be

(a) See *Lushington v. Onslow*, 6 No. Cas. 183; 12 Jur. 465; *Greville v. Tylee*, 7 Moo. P. C. 320.

(b) 3 Curt. 769; 1 Williams Exors. 140. See also In the goods of *Nelson*, 6 Ir. Rep. Eq. 569, Prob.

(c) *Cooper v. Bockett*, 4 Moo. P. C. 419; 10 Jur. 835; In the goods of *Oppenheim*, 17 Jur. 306; In the goods of *Rushout*, 13 Jur. 458; In

the goods of *Abbey*, 5 No. Cas. 615; In the goods of *Ibbetson*, 2 Curt. 337; In the goods of *Beavan*, 2 Curt. 369; In the goods of *James*, 1 S. & T. 238.

(d) *Townley v. Watson*, 3 Curt. 769; 1 Williams Exors. 141.

(e) In the goods of *Ibbetson*, 2 Curt. 337; In the goods of *Nelson*, 6 Ir. Rep. Eq. 569, Prob.

illegible, and another is substituted for it; if the substituted provision should be inoperative for any reason, the doctrine of dependent relative revocation is applied, so as to preserve the obliterated words, which may be proved by evidence *aliunde* (a).

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19. When a testator made some alterations in a duly executed will, and he and the attesting witnesses traced their former signatures with a dry pen, and the attesting witnesses placed their initials in the margin opposite each of the alterations, the Court refused to regard the initials in the margin as evidence that the alterations had been duly executed and attested, and declined to grant probate of the will with alterations (b).

(a) In the goods of *Nelson*, 6 Ir. Rep. Eq. 569, Prob.; *Brooke v. Kent*, 3 Moo. P. C. 334; *Soar v. Dolman*, 3 Curt. 121; *Townley v. Watson*, *ibid.* 769; In the goods of *Bedford*, 5 No. Cas. 188; In the goods of *Harris*, 1 S. & T. 536; In the goods of *Parr*, 29 L. J. P. 70; 6 Jur. N. S. 56; In the goods of *Reeve*, 13 Jur. 370; In the goods of *Beavan*, 2 Curt. 369. If, however, the erased words cannot be ascertained, probate should be granted in blank as to the erased parts: In the goods of *James*, 1 S. and T.

238; In the goods of *Livock*, 1 Curt. 906. An alteration does not need a memorandum of attestation to make it valid: In the goods of *Wingrove*, 15 Jur. 91. The initials of the testator and witnesses, placed in the margin of the will near the alteration, are sufficient to incorporate the alteration into the will: In the goods of *Hinds*, 16 Jur. 1161.

(b) In the goods of *Cunningham*, 4 S. & T. 194; 29 L. J. P. 71. See also In the goods of *Martin*, 1 Rob. 712; 6 No. Cas. 694. But see in the goods of *Dewell*, 17 Jur. 1130.

CHAPTER V.

OF THE REVOCATION OR ALTERATION OF WILLS MADE IN DUPLICATE.

1. Wills frequently made in duplicate, and questions arise as to the effect upon one duplicate of alterations in the other.
2. The revocation by cancellation of one duplicate operates as a revocation of the other, if one is in the testator's custody, and the other not.
3. And the same presumption, though weaker, arises if both are in the testator's custody.
4. Remarks on this presumption.
5. In *Roberts v. Round*, where one duplicate was destroyed and the other carefully preserved, the latter was held unrevoked.
6. The erasure in one duplicate is an erasure in the other.
7. If a duplicate, known to have been in testator's custody, cannot be found, presumption arises that the will is revoked.

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CHAP. V.

1. Wills being frequently made in duplicate, questions have arisen as to the effect upon one duplicate of alterations made by the testator in the text or condition of the other.

2. The cancellation *animo revocandi* by the testator of one duplicate in his custody, revokes the other which is not in his custody (a).

3. But it may happen that both duplicates are in the testator's custody, and that he cancels but one. In such a case, Lord Chancellor Erskine expressed an opinion that a presumption arises of an intention to revoke the whole will, though weaker than in a case where the duplicate is out of the testator's custody; and that when the testator alters one and then destroys that which he had altered,

(a) *Onions v. Tyrer*, 2 Vern. 741; *Seymour's case*, cited in *Burtenshaw v. Gilbert*, 1 Cowp. 52; *Colvin v. Fraser*, 2 Hagg. 266; *Rickards v. Mumford*, 2 Phillim. 23; *Boughey*

v. Moreton, 3 Hagg. 191, n. See also in the goods of *Slade*, 30 L. T. N. S. 330; *Doe d. Strickland v. Strickland*, 8 C. B. 724; 19 L. J. C. P. 89.

retaining the other intact, the same presumption obtains, but still weaker (a). BOOK IV.
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4. The presumption in the latter case, however, seems quite as much in favour of an intention to let the duplicate which he had not altered stand, since the fact of having altered one of the duplicates explains sufficiently the reason for destroying that one, and the fact of the other being preserved, rather looks towards the purpose of having it remain in force, after any sufficient reason is found for destroying the duplicate, which does not attach to the part preserved (b).

5. And accordingly in the case of *Roberts v. Round* (c), where one of the duplicates, both being in the testator's custody, was found mutilated, and the other carefully preserved, it was held the will remained unrevoked.

6. It has lately been determined that the erasure of one part of a will, executed in duplicate, is to be regarded as *prima facie* an alteration of the whole will (d), and the same rule obtains where the testator had expressed the same purpose both in the will and codicil, but had obliterated it in the codicil only (e).

7. It has been held, in analogy to the rule laid down regarding wills not executed in duplicate, 'that if a will was executed in duplicate, and the testator has the custody of one part, and it cannot be found after his death, the presumption of law is, that he destroyed it *animo revocandi*; and both parts are consequently to be considered revoked, unless this presumption be rebutted (f).

(a) *Pemberton v. Pemberton*, 13 Ves. 310.

(b) 1 Jarm. Wills, 129; 1 Redf. Wills, 308, 310.

(c) 3 Hagg. 548.

(d) *Doe d. Strickland v. Strickland*, 8 C. B. 724; 1 Redf. Wills, 310, 311.

(e) 1 Redf. Wills, 310, 311; *Uttersen v. Uttersen*, 3 V. & B. 122.

(f) *Rickards v. Mumford*, 2 Philim. 23; *Colvin v. Fraser*, 2 Hagg. 266; *Saunders v. Saunders*, 6 No. Cas. 518.

CHAPTER VI.

OF THE EFFECT ON A CODICIL OF THE REVOCATION OF THE WILL OF WHICH IT FORMS PART.

1. A codicil was, under the old law, *prima facie* dependent on the will, and was revoked by the revocation of the will unless it could be shown that it was intended to subsist independently.
2. This fact may be shown in various ways.
3. Cases of In the goods of *Harris* and In the goods of *Ellice*.
4. Leading case of *Black v. Jobling*. The cases reviewed.
 - (a) Statement of the facts of that case.
 - (b) The general rule of the old law stated.
 - (c) Case of *Barrow v. Barrow*.
 - (d) Case of *Medlycott v. Asheton* considered.
 - (e) Case of *Tagart v. Bakewell* considered.
 - (f) These cases leave in doubt what is meant by "dependent on the will."
 - (g) Remarks on these cases.
 - (h) All these cases occurred before the Wills Act.
 - (i) The case of *Clogstown v. Wallcott* since the Act reviewed—Case of *Grimwood v. Cozens*.
 - (k) The effect of the statute not fully considered in these cases.
 - (l) The statute plainly requires an actual revocation by the modes mentioned in the Act.
5. The case of *Black v. Jobling* confirmed by the case of In the goods of *Savage*.
6. These cases lay down a plain and distinct rule.



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1. A codicil was, under the old law, *prima facie* dependent on the will with which it was connected, and the destruction of the latter was an implied revocation of the former (a). Subject to this rule, the question whether a codicil was to be considered revoked by the revocation of the will, was one of intention. Where a will and codicil had been in existence, and the will was afterwards revoked, it must have been shown by the party applying for probate of the codicil that it was intended by the deceased

(a) 1 Williams Exors. 148.

that it should operate separately from the will; otherwise, it was presumed that, as the will was destroyed, the codicil was gone also (a). BOOK IV.
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2. That the codicil was intended to be an independent instrument, operating separately from the will, might be shown in various ways. The frame of the codicil was important. If it was entire and intelligible in itself, and contained an effective distribution of all or most of the testator's estate, and was found carefully preserved by the testator in a place where he naturally would have been aware of its existence, it would have afforded a very strong presumption of an intention to have it operate. But, when those circumstances were wanting, or others indicating a contrary purpose existed, it might have required a different consideration; as when the dispositions of the codicil were so complicated with and dependent upon those of the will, as to be incapable of a separate and independent existence (b).

3. In the goods of *Harris* (c), the Court allowed probate of the codicil alone; founding its action on the state of the will, and on parol evidence that the deceased intended the codicil to stand, notwithstanding the revocation of the will. And in the goods of *Ellice* (d) it was held that the codicil, being substantially independent of the will, was not involved in the destruction of the latter.

4. In *Black v. Jobling* (e), Lord Penzance reviewed the previous cases on the subject under consideration; and as

(a) *Grimwood v. Cozens*, 2 S. & T. 364; 5 Jur. N. S. 497, per Sir C. Cresswell. See also *Barrow v. Barrow*, 2 Lee, 335; *Plenty v. West*, 1 Rob. 264; *Taggart v. Hooper*, 1 Curt. 289; *Medlicott v. Asheton*, 2 Add. 331; In the goods of *Halliwel*, 4 No. Cas. 400; *Clogstown v. Walcott*, 5 No. Cas. 623; In the goods of *Greig*, L. R. 1 Prob. 72; 35 L. J. P. 113; 13 L. T. N. S. 680.

(b) 1 Jarm. Wills, 130; *Ustick v. Bowden*, 2 Add. 116-7; 1 Redf. Wills, 311-312.

(c) 3 S. & T. 485; 10 Jur. N. S. 684.

(d) 33 L. J. P. 27; 12 W. R. 353.
(e) L. R. 1 Prob. 685; 38 L. J. P. 74; 21 L. T. N. S. 298.

BOOK IV. the 20th section of the English Wills Act, on the con-
 CHAP. VI. struction of which that case turned, has been adopted in this
 country, with some slight modifications, by Stat. Ont. 32
 Vict. c. 8, s. 5, and "The Wills Act, 1873," s. 17, the
 remarks of the learned Judge will serve to explain the
 state of the law as it now exists, and as it existed in this
 Province before the passing of the last mentioned Acts.

(a) "In this case," said the learned Judge "the deceased
 had executed several wills; but at the time of his death
 no valid will was found. In the hands of a legatee, how-
 ever, was a document which purported to be a codicil, and
 is dated Oct. 19th, 1867. It recites that the deceased had
 already bequeathed to his grandchildren the lease, stock,
 and profits, with everything relating to the farm of Fen-
 ham Hill, and gives in addition to each of them 300*l*.
 The question is, whether this paper can be admitted to
 proof. It speaks of a bequest of a certain farm, which is
 contained, not in any will of the deceased, but in a deed
 of gift executed by him on the 25th of May, 1867.

(b) "The general proposition in relation to codicils is,
 that a codicil stands or falls with the will to which it be-
 longs. This general proposition is subject to certain ex-
 ceptions, and my first consideration will be what were
 the exceptions under the old law? The result of my in-
 quiry into the matter is very unsatisfactory.

(c) "The first case reported is that of *Barrow v. Bar-
 row and Others* (a). The deceased in that case had exe-
 cuted a will and codicil. By the codicil he gave the
 residue of his property to his wife. He then burnt his
 will. The Court said: 'As to the codicil, it was clear
 that, by the law of England, it was not destroyed by the
 burning of the will, but was a substantive instrument or

(a) 2 Phillim. t. Lee, 335.

testamentary schedule; and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil, I pronounced for the validity of it as a testamentary disposition.' And yet, in that case, the codicil only disposed of the residue, and it was not possible to ascertain the extent of the term 'residue' without the will.

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(d) "The next case was *Medlycott v. Assheton* (a), in which the deceased executed a will and codicil. By the codicil she gave 100*l.* each to two trustees named in her will, and divided some trinkets amongst her family. She afterwards ordered the will to be destroyed, which was done, but she preserved the codicil uncanceled, and it was found in her writing-desk. Sir J. Nicholl said: 'A codicil is *prima facie* dependent on the will; and the cancellation of the will is an implied revocation of the codicil. But there have been cases where the codicil has appeared so independent of and unconnected with the will, that, under the circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of intention, consequently the legal presumption in this case may be repelled merely by showing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption.'

(e) "In *Tagart and Bakewell v. Hooper* (b), the codicil was headed, 'This is a codicil to my last will, and to be taken as a part thereof.' Sir H. Jenner, in pronouncing for its validity, said: 'In all the cases referred to, there

(a) 2 Add. 229.

(b) 1 Curt. 289.

BOOK IV. were circumstances which showed that the codicils were
CHAP. VI. dependent upon the will; there is nothing here to show that the codicil was contingent upon the existence of the will. The Court, therefore, in this case, suggests a presumption contrary to that raised in the other cases; for it decides that, to make a codicil invalid, there must be proof that it was intended to be dependent on the will.

(f) "The consideration of these cases leaves upon the mind no very definite idea of what is meant by 'dependent on the will.' In one sense, any codicil that makes any disposition of property at all must be considered to be dependent on the will, 'which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot, with any certainty, be dis severed from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil, that the testator would have made it, if he had disposed of his other property in any different manner than that expressed by his will.

(g) "It may be that the independence of the will spoken of, is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it is of such a character that the giving validity and effect to it, without the will to which it was intended to be attached, would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it.

(h) "*But all these cases occurred before the Wills Act.*

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Now, the 20th section of that Act is most distinct and positive in its terms: 'No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, * * * or by the burning, tearing, or otherwise destroying the same by the testator, * * * with the intention of revoking the same.' And I should have had no hesitation in holding that the intention of that section was to do away with all these implied revocations, and relieve the subject from the doubt and indistinctness in which the cases had involved it.

(2) "But there have been two cases decided since the Act. The first was *Clogstown v. Walcott and Others* (a), in which the only observation bearing on this point, made by Sir H. J. Fust, was, 'Under the old law the effect of destroying a will was, by presumption, to defeat the operation of the codicils to that will; but by the present law there must be an intention to destroy.' The other was the case of *Grimwood v. Cozens and Others* (b), in which Sir C. Cresswell said: 'I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was *prima facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the Statute. The question, then, is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shown by the party applying for the probate of the codicil alone,

(a) 5 No. Cas. 623.

(b) 2 S. & T. 364.

BOOK IV. that it was intended that it should operate separately
 CHAP. VI. from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked.

(*k*) "Now, in reviewing these decisions, I cannot perceive that the effect of the Statute has been fully considered by the Court. Sir C. Cresswell seems to have thought that it had been decided that the Statute made no difference, and passed it by as having been so decided; and Sir H. J. Fust dismissed the point without any reasoning whatever, merely affirming that the Statute had made it necessary that there should be an affirmative intention to revoke.

(*l*) "But the Statute says nothing of the kind, and unless it makes an actual revocation necessary, it does not interfere with the existing law at all. In this unsatisfactory state of the decisions, I think I shall do best in such a case as the present by adhering to the Statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the Statute as the only modes by which a codicil is to be revoked, it remains of full force and effect, and is entitled to be admitted to proof."

5. The case of *Black v. Jobling* was followed by the recent case of *In the goods of Savage (a)*, decided by the same Judge (Lord Penzance), who, after referring to the former doctrine, to the case of *Black v. Jobling*, and to the wording of the 20th section of the English Act (1 Vict. c. 26), remarks: "The Court cannot, in the teeth of the language of that section, lay down the proposition that a codicil is revoked by the mere fact of the revocation of the will." He then mentions the cases of *Clogstown v. Walcott* and *Grimwood v. Cozens*, and remarks: "It

(*a*) 1. R. 2 Prob. 78; 39 L. J. P. 25; 18 W.R. 766; 22 L.T.N.S. 375.

seems to me that the matter was not properly considered in those cases. I said as much in *Black v. Jobling*; but on looking at the case again, it occurred to me that the meaning of the Court had not, perhaps, been made sufficiently clear. The result is that, in my judgment, the words of the Statute are imperative, and that the decisions to which I have referred, since the passing of the Statute, do not appear to have proceeded on a consideration of the effect of those imperative words. In this case, the testator having left behind him a properly executed testamentary paper, which no doubt is in the form of a codicil, that paper must be admitted to probate, unless it is revoked in some manner indicated by the Statute. If a testator destroys his will and does not destroy his codicil, it appears to me that his intention probably is not to revoke the codicil; but *I proceed not on the ground of intention, but on words of the Statute. I hold that when a testator has once executed a testamentary paper, that paper will remain in force unless revoked in the particular manner named in the Statute*" (a).

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CHAP. VI.

6. These decisions lay down a plain and satisfactory rule regarding the revocation of codicils. Codicils are, in considering the question whether or not they are revoked, to be treated as independent testamentary papers. The old doctrine that the codicil is *prima facie* dependent on the will may be considered as abrogated by the Statute;

(a) See also the recent case of *In the goods of Turner*, L. R. 2 Prob. 403; 21 W. R. 38; 27 L. T. N. S. 322, where there was a close connection between the will and the codicil. In the latter, the testatrix referred in several paragraphs to the dispositions contained in the will, and she

bequeathed a legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil; and the Court held that the latter must be admitted to probate. This seems to be an extreme case.

BOOK IV. and the question in each case will be, "Has the codicil
CHAP. VI. been revoked by any of the means prescribed by the
Act" (a) ?

(a) It seems strange that this conclusion, if correct, should not long since have been established. It seems, however, to be based upon clear and satisfactory reasoning.

CHAPTER VII.

OF DEPENDENT RELATIVE REVOCATION.

1. Origin and application of the doctrine of dependent relative revocation.
2. Case of *Onions v. Tyrer*, one of the earliest cases on the subject.
3. Statement of the doctrine by the Master of the Rolls in *Ibbott v. Bell*.
4. Case of *Powell v. Powell* stated.
5. Sir J. P. Wilde's judgment in that case.
6. Cancellation preparatory to the making of a new will, which was never made, ineffectual.
7. Cancellation, in consequence of a misapprehension as to the effect of a subsequent will, held ineffectual.
8. Revocation under the impression that the will was invalid, held ineffectual.
9. The doctrine applies to partial alterations.
10. Statement of the law by Baron Parke in *Locke v. James*.
11. Case of *Dickinson v. Swatman*.
12. Opinion of Sir C. Cresswell in that case.
13. The case of *Dickinson v. Swatman*, as reported, conflicts with *Powell v. Powell*.
14. The intention of the testator to revive an earlier will must, in order that the later destroyed will may be supported by the doctrine in question, be plainly declared at the time of destruction.
15. A revocation made under a false impression of fact ineffectual.
16. And it is immaterial whether the false impression is the result of deceit or mistake.
17. Distinction between cases where testator refers to a fact as having actually happened, and those where the revocation is founded on an expressed doubt.
18. Case of *Attorney-General v. Ward*. Lord Alvanley's opinion on the foregoing distinction.
19. Where the second disposition fails for want of capacity in the grantee, the first is nevertheless effectually revoked.
20. If the testator revokes his will upon the mere general purpose (unfulfilled) of making another, the revocation is effectual.
21. In order that the doctrine may be applied, there must be proof of actual destruction.

1. The doctrine of dependent relative revocation has been established by the Courts to limit the consequences of mistakes and misapprehensions on the part of testa-

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CHAP. VII.

BOOK IV. tors. It applies in a variety of cases, but most commonly
 CHAP. VII. in those where the testator, having made a subsequent will, which fails to take effect by reason of defective execution or otherwise, revokes a prior will: in such cases, the condition upon which the revocation was presumed founded, being unfulfilled, the former will remains unrevoked.

2. One of the earliest cases in which the doctrine in question was applied was *Onions v. Tyrer* (a). In that case a man made a second will to the use of the same person to whom he had devised the land by the first will, with a variation only in the name of one of the trustees; but the second will was not good, because not duly attested according to the Statute of Frauds. After so executing the second will, he proceeded to cancel the first by tearing off the seal. One question was, whether the cancelling of the former will was a revocation thereof within the Statute of Frauds and Perjuries; and it was held that it was not, because there was no self-substituting independent act, but only an act done to accompany or in way of affirmation of the second will. It was done from an opinion that the second will had actually revoked the first, which induced the testator to tear that, as of no use. Therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it; for though a man might, by the Statute of Frauds, as effectually destroy his will by tearing or cancelling it, as by making a second will; yet when he intended to revoke the first will by the second, and it was insufficient for that purpose, as in the principal case, and the tearing and cancelling the first was only in consequence of his opinion that he thereby made good

(a) 2 Vern. 742; S. C. Prec. in Ch. 459; 1 Eq. Cas. Abr. 408.

the second will, the tearing and cancelling should not destroy the first, but it ought to be considered as still subsisting and unrevoked (a). It would have made no difference if the latter will had been in favour of another person from the former (b).

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3. The doctrine of dependent relative revocation has been thus laid down by the Master of the Rolls in *Ibbott v. Bell* (c): "If a will is revoked by cancellation, so as to give effect to different dispositions, such revocation is not effectual if the substituted dispositions are not effective. The rule of the English law, following that of the civil law, is, *Tunc prius testamentum rumpitur cum posterius perfectum est.*"

4. In *Powell v. Powell* (d), where a testator executed a will in 1864, revoking all former wills, and in 1865 he destroyed this will, with an intention expressed at the time that he wished to substitute for it a will of 1862 which he held in his hand; this intention failing to take effect (e), it was held that the act of destruction by the testator was referable solely to his intention to validate the will of 1862, and that the act being conditional and the condition unfulfilled, there was no revocation.

5. Sir J. P. Wilde remarks in his judgment: "I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based upon the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument, are in their nature equivocal; they may be the result of accident, or, if intentional, of various intentions. It is therefore necessary in each case to study the act done by the light of the circumstances under

(a) *Powell Dev.* 60.

(b) See Sir Wm. Grant's judgment in *Ex parte the Earl of Ilchester*, 7 Ves. 379.

(c) 34 Beav. 395.

(d) L. R. 1 Prob. 209; 35 L. J. P. 100; 14 L. T. N. S. 800.

(e) See 1 Vict. c. 26, s. 22.

BOOK IV. which it occurred, and the declarations of the testator
 CHAP. VII. with which it may have been accompanied. For unless
 it be done *animo revocandi*, it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted; and such has been the course of decision in the various cases quoted in argument. But then it is said that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long-previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, 'I tear this will of 1860 because I have this day (1st of January, 1861) executed another designed to replace it,' or 'I tear this will of 1860 because I desire and expect that the effect of my doing so will be to set up my old will of 1840? In either case the revocatory act is based on a condition which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and, as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present" (a).

(a) See also *Scott v. Scott*, 5 Jur. N. S. 298; 1 S. & T. 258; *Ex parte Earl of Ilchester*, 7 Ves. 348, 372, 379; *Perrott v. Perrott*, 14 East. 423; *Major v. Williams*, 3 Curt. 432; *In the goods of Cockayne*, Deane Ecc. Rep. 177; 2 Jur. N. S. 454; *Hall v. Tokelove*, 2 Rob. 318;

6. In a case before Sir John Nicholl (*a*), where it appeared that a will was, by the direction of the testator, altered in pencil, and was approved of by him when so altered, and was then cancelled only in order that another might be drawn up, which was prevented by the testator's death; the learned judge held that the cancellation being preparatory to the deceased making a new will, and conditional only, was not a revocation (*b*).

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7. It was considered by Lord Ellenborough, in the case of *Perrott v. Perrott* (*c*), that a will cancelled in consequence of a mistaken idea of the legal effect of the provisions made by a subsequent will, is not thereby effectually revoked. "If," said his Lordship, "a man cancel his will under a mistake in point of fact that he has completed another, when he really has not, as was the case in *Hyde v. Hyde*, the cancellation is void; and if he cancel it under a mistake in law, that a second will, complete as to the execution, operates upon the property contained in the first, when, from some clerical rule, it really does not, shall this be deemed a valid cancellation?"

8. The doctrine of dependent relative revocation has recently been applied to a case in which it appeared that a testator, under the false impression that his will was invalid, tore it up. Immediately afterwards, on reconsideration, he collected the pieces, and placed them together amongst his papers of importance, and preserved

Newton v. Newton, 12 Ir. Ch. Rep. 118; 13 Ir. Ch. Rep. 245; In the goods of *Middleton*, 3 S. & T. 583; 11 L. T. N. S. 684; 10 Jur. N. S. 1109; 34 L. J. P. 16; *Clarkson v. Clarkson*, 2 S. & T. 497; *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J. P. 49; 8 Jur. N. S. 391; 5 L. T. N. S. 719; *Dickinson v. Swatman*, 6 Jur. N. S. 831; 30 L. J. P. 84; *Lord Thynne v. Stanhope*, 1 Add 52; *Tupper v. Tupper*, 1 Kay & J. 665; *Nevill v. Boddam*, 28 Beav. 554;

Quinn v. Butler, L. R. 6 Eq. 225; *Burtenshaw v. Gilbert*, Cowp. 49; *Winsor v. Pratt*, 5 J. B. Moo. 484; 2 Br. & B. 650. But see In the goods of *Weston*, L. R. 1 Prob. 633; 38 L. J. P. 53; 20 L. T. N. S. 330.

(a) In the goods of *Applebee*, 1 Hagg. 143.

(b) See also In the goods of *De Bode*, 5 No. Cas. 189; In the goods of *Eeles*, 2 S. & T. 600; In the goods of *Mitcheson*, 32 L. J. P. 202.

(c) 14 East. 440.

BOOK IV. them until his death; the Court held that as the act done
CHAP. VII. was not accompanied by an intention to revoke a valid will, it was ineffectual as a revocation, and the will was admitted to probate (a).

9. The doctrine of dependent relative revocation applies to partial alterations. Thus, when a testator strikes out the name of a devisee, and at the same time interlines that of another, or substitutes a larger or smaller interest for that which he had previously given; if the interlineation is inoperative for want of attestation, the obliteration will also fail of effect (b). And when a testator executed a will bequeathing a number of legacies, the amounts of which were stated in words, and afterwards erased some of these words, and inserted others—the alterations being unattested—and also cut out a portion of his will, the substitutions failing of effect, the doctrine of dependent relative revocation was applied so as to preserve the will in its original condition (c).

10. In *Locke v. James* (d), Parke B. said, "It (the erasure) is treated as an act done by mere mistake, *sine animo cancellandi*. What the testator in such a case is considered to have intended is a complex act, to undo a previous gift for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the gift at all." The doctrine under discussion is here very clearly stated.

11. In the case of *Dickinson v. Swatman* (e) it was, however, held, that where a testator had made a will in 1826,

(a) *Giles v. Warren*, L. R. 2. Prob. 401; 41 L. J. P. 59; 26 L. T. N. S. 780; 20 W. R. 827.

(b) *Short v. Smith*, 4 East, 419; *Kirke v. Kirke*, 4 Russ. 435; *Locke v. James*, 11 M. & W. 901; *Soar v. Dolman*, 3 Curt. 121; *Brooke v. Kent*, 3 Moo. P. C. 334; 1 No. Cas. 99; In

the goods of *Ibbetson*, 2 Curt. 337; In the goods of *Reeve*, 13 Jur. 370.

(c) In the goods of *Nelson*, 6 Ir. Rep. Eq. 569, Prob.

(d) Sup.

(e) 6 Jur. N. S. 831; 4 S. & T. 206; 30 L. J. P. 84.

and a subsequent one in 1851 which revoked the former will, and in 1859 he destroyed the will of 1851 with the avowed object of recalling into existence the will of 1826; an object which was prevented by s. 22 of 1 Vict. c. 26; it was held that, although the intention of the testator failed, yet the destruction of the will of 1851 must be held to be final and complete, and the deceased must be considered to have died intestate. BOOK IV.
CHAP. VII.

12. Sir C. Cresswell said, "The doctrine of dependent relative revocation applies only where a will is destroyed on the supposition that a subsequently executed will is valid. There is no case in which it has been applied to past transactions, or that a will which has been cancelled on the supposition that an earlier will is thereby revived, shall, on the failure of that condition, be re-established."

13. The circumstances in *Dickinson v. Swatman*, it will be observed, were very similar to those in *Powell v. Powell* above referred to (a), in which the Court came to a contrary conclusion. Sir J. P. Wilde remarks in his judgment that Sir C. Cresswell, in deciding *Dickinson v. Swatman*, did not appear to have been satisfied that the sole intention in destroying was to set up the previous will; and he suggests that the case was decided on other grounds than those assigned in the report. Such indeed appears to have been the fact; and the case of *Dickinson v. Swatman* may, therefore, be considered only an authority for the proposition, that the Court will not apply the doctrine of dependent relative revocation to a case where a testator has destroyed a will, through a mistaken notion of the legal effect of its destruction, if it is satisfied that he intended entirely to revoke that will.

14. The intention of the testator to revive an earlier

(a) L. R. 1 Prob. 209.

BOOK IV. will by the destruction of a later one must, in order that
 CHAP. VII. the doctrine of dependent relative revocation may be successfully invoked in favour of the destroyed will, be plainly declared at the time of the destruction. Thus, where, in England, a testatrix destroyed a will, without stating at the time her intention in doing so, and she subsequently, on the same day, said that she destroyed the will with the intention that a former will should take effect, the Court refused probate of the destroyed will (a). And it is also necessary, in order to establish a case of dependent relative revocation, to show, by the evidence of disinterested witnesses, that the act of destruction by the testator was referable wholly and solely to an intention to set up some other testamentary paper (b).

15. The principle of the doctrine of dependent relative revocation has been extended to cases in which, by a subsequent will or codicil, a disposition is made different from a former one under a false impression, the impulse of which is the foundation of his wish to change his former intent; in such cases the new disposition will be considered only as effecting a contingent presumptive revocation, depending on the existence or non-existence of that fact (c). As if one, having previously devised to A, afterwards, by another will, without destroying the first, or by codicil, devise to B, stating her to be his wife, so that it may be understood that he intended her to be benefited in that character only, and it turn out that she was married before, and had a husband living, neither of which facts were in the devisor's knowledge (d), such devise or codicil will not operate as a revocation of the

(a) In the goods of *Weston*, L. R. 1 Prob. 633; 38 L. J. P. 53; 20 L. T. N. S. 330.

(b) *Eckersley v. Platt*, L. R. 1 Prob. 281; 36 L. J. P. 7; 15 L. T. N. S. 327.

(c) 1 Williams Exors. 165.

(d) An appointment by a will to a husband under circumstances of this nature occurred in *Kendall v. Abbott*, 4 Ves. 802.

former will, because it depends on a contingency which fails (a). BOOK IV.
CHAP. VII.

16. And it is immaterial to the operation of the rule whether the testator acts under a false impression originating from a deceit practised upon him, or whether the reason given by him for making the new disposition is the result of mistake on the part of the testator, and not of deceit practised upon him (b). Thus, where the testator gave legacies to the grandchildren of his sister, and afterwards, by a codicil, revoked the legacies, giving as a reason that the legatees were dead; upon its being proved that the fact of their death was not true, Lord Loughborough held that the legacies were not revoked, on the ground that the cause of the revocation was false; and said whether it was by misinformation or mistake was perfectly indifferent (c).

17. It must be observed, however, that there is a distinction between cases where the testator refers to a fact as having actually happened, which is the class of cases just considered, and those in which the revocation is founded merely upon an expressed doubt, supposition, or advice of the fact. In the latter class of cases, the authorities show that whether or not the doubt, supposition, or advice is well founded, the revocation is effectual (d).

18. In the case of *The Attorney-General v. Ward* (e), a testatrix, having by her will given 300*l.* to be divided among such of the children of E. D. as should be living, by a codicil gave to her brother's son "the 300*l.* designed

(a) 1 Powell Dev. 524.

(b) 1 Williams Exors. 165, 166.

(c) *Campbell v. French*, 3 Ves. 322. See also *In the goods of Moresby*, 1 Hagg. 378, where a nuncupative will, made under the mistaken impression that a former written will was lost, was held not to have revoked the former will; and *Doe v.*

Evans, 10 A. & E. 228, where the Court supported the provisions of a will which the testator had revoked under the mistaken impression that no person intended to be benefited by the former will was in existence.

(d) 1 Williams Exors. 167; *Attorney-General v. Lloyd*, 3 Atk. 515.

(e) 3 Ves. 327.

BOOK IV. for E. D.'s children, as I know not whether any of them
 CHAP. VII. are alive, and if they are well provided for." Lord
 Alvanley held that this operated as a complete revocation
 of the legacy, though the children of E. D. were alive,
 and claimed the legacy. The learned Judge observed
 that it had been argued, and with some ground, that if
 it had rested upon her not knowing whether they were
 living, there would be good reason to contend that it fell
 within the case of "*Pater credens filium suum esse
 mortuum alterum instituit hæredem; filio domum
 redeunte hujus institutionis vis est nulla*" (a). But she
 went further; that she doubted, "if they were living,
 whether they might not be well provided for," and the
 Court would not inquire whether they were well provided
 for or not (b).

19. It has been established that where a second dispo-
 sition fails from want of capacity in the legatee to take,
 the revocation of the former disposition thereby effected
 is nevertheless effectual (c).

20. If the testator destroys his will upon the mere
 general purpose of thereafter making another, it will not
 defeat the revocation being effectual because he dies
 without carrying his purpose of making a new will into
 effect (d). Thus in a case in our own Courts (e), where the
 testator, having already made a will, caused a new will to
 be prepared, evidently intending it to be substituted for
 the former will, and the old will was found amongst his
 papers with the draft of the new will, but the former had
 been cancelled by erasing the name and seal of the
 testator and the names of the witnesses, and the new will

(a) Cicero de Oratore, lib. I. c. 38.

(b) 1 Williams Exors. 168.

(c) *Tupper v. Tupper*, 1 Kay & J. 665. See also *Quinn v. Butler*, L. R. 6 Eq. 225.

(d) *Williams v. Tyley*, 1 Johns. 529.

(e) *Doe d. Crooks v. Cummings*, 6 U. C. Q. B. 305.

was unexecuted, it was held that the old will was effectually revoked, and that the testator had died intestate, the Court remarking that no case could be found to support the proposition that when the former will was completely cancelled a mere intention to substitute a new will for it would prevent such cancellation from being effectual. BOOK IV.
CHAP. VII.

21. The Courts will not apply the principle of dependent relative revocation unless there is proof of the actual destruction of the instrument (a).

(a) *Homerton v. Hewett*, 25 L. T. N. S. 854.

CHAPTER VIII.

OF THE CONSEQUENCES RESULTING FROM THE LOSS OR MUTILATION OF A WILL.

1. The rule is, that a will traced into testator's custody and not found at his death, is presumed to have been revoked; but if in custody of another, revocation must be proved.
2. Example of this rule.
3. There must, however, be evidence to satisfy the Court that the will was not in existence at the time of the testator's death.
4. The rule is not always rigidly adhered to—example.
5. If testator having custody of his will becomes insane, revocation will not be presumed.
6. After due execution of a will is proved, the burden of proving revocation lies on those who assert it.
7. Mutilations presumed to have been made after execution.
8. Declarations of a testator not admissible unless part of the *res gesta*.
9. A will lost or destroyed by accident may be proved in various ways.
10. The Court regards evidence of the contents of a lost will with great jealousy. The evidence must be clear and satisfactory.
11. Example of insufficient proof of execution.
12. An entry in the books of a deceased solicitor, in his own handwriting, held admissible to prove that a will was executed.
13. Mode of establishing contents of a lost will considered.
14. The declarations of a testator when he made his will, as to its contents, held admissible to prove the contents, if the will be lost.
15. It is not necessary to show how the original instrument was lost.
16. Wills of living persons may be deposited for safe keeping in the Surrogate Court office.

BOOK IV. 1. The rule of evidence in regard to presumptive revo-
CHAP. VIII. cations from the absence or mutilation of the will seems
to be, that if the will was traced into the testator's posses-
sion or custody, and was there found mutilated in any of
the modes pointed out in the statute for revocation, or was
not found at all, it was presumed that the testator destroyed

or mutilated it *animo revocandi* (a); but if it was last in the custody of another, it was incumbent upon the party asserting revocation to show the will again in the testator's custody, or that it was destroyed or mutilated by his direction (b). BOOK IV.
CHAP. V II

2. Where a portion of a will was found locked up in the testator's bureau, the first sheet, containing the substance of the will, being detached and missing, it was held on the presumption of law, that the mutilation was done by the testator *animo revocandi* (c). And a codicil not found with the will, and other codicils, is presumed to have been revoked (d).

3. But the presumption that a will in the testator's possession, and not forthcoming after his death, has been revoked, does not arise, unless there is evidence to satisfy the Court that it was not in existence at the time of his death. Thus, when a will which had been in the testator's custody, could not be found in his depositories after his death, but there was evidence of declarations recognizing its existence up to within three weeks of his death, and there was no evidence of any change of intention during those three weeks, and the only person who was inter-

(a) *Cutto v. Gilbert*, 9 Moo. P. C. S. 131; *Bessey v. Bostwick*, 13 Grant, 279; *Elms v. Elms*, 1 S. & T. 155; 4 Jur. N. S. 765; 27 L. J. P. 96; In the goods of *Mitcheson*, 9 Jur. N. S. 360; 32 L. J. P. 202; In the goods of *Shaw*, 1 S. & T. 62; 31 L. T. 41; *Homerton v. Hewett*, 25 L. T. N. S. 854.

(b) *Hare v. Nasmith*, 3 Hagg. 192 n.; In the goods of *Lewis*, 1 S. & T. 31; 4 Jur. N. S. 243; 27 L. J. P. 31; *Battyll v. Lyles*, 4 Jur. N. S. 718; *Eckersley v. Platt*, L. R. 1 Prob. 281; 36 L. J. P. 7; 15 L. T. N. S. 327; *Wood v. Wood*, L. R. 1 Prob. 309; 36 L. J. P. 34; 15 L. T. N. S. 593; *Patten v. Poulton*, 1 S. & T. 55; 4 Jur. N. S. 341; 27 L. J. P. 41. See *Wynn v. Heveningham*, 1 Coll. 638, 639, upon the

general question of presumptions, and 1 Redf. Wills, 306, 307; *Evans v. Dallow*, 31 L. J. Prob. 128; In the goods of *Brown*, 1 S. & T. 32; 4 Jur. N. S. 244; 27 L. J. P. 20; *Battyll v. Lyles*, sup.; In the goods of *Shaw*, 1 S. & T. 62; *Mumford v. Rickards*, 2 Phillim. 23; *Thynne v. Stanhope*, 1 Add. 52; *Shaw v. Thorne*, 4 No. Cas. 649; In the goods of *Gullan*, 1 S. & T. 23; 27 L. J. P. 15; 4 Jur. N. S. 196.

(c) *Williams v. Jones*, 7 No. Cas. 106. See also, In the goods of *Gullan*, sup.; *Gullan v. Grove*, 26 Beav. 64. See also as to the contrary presumption, In the goods of *King*, 2 Rob. 403; In the goods of *Kenet*, 2 N. R. 461.

(d) In the goods of *Shaw*, 1 S. & T. 62; 31 L. T. 41.

BOOK IV. ested in an intestacy had access to and made a search in the
CHAP. VIII. depositories before they were searched by any other person, and failed to appear to be cross-examined, the Court refused to presume that the will had been revoked, and granted probate of the draft (a).

4. And the rule of evidence, above referred to, is not rigidly adhered to. Thus, where a will, executed two years before the death of the testator, was found in a box, torn in several pieces, and the woman who had cohabited with the testator some years before his decease in December, 1860, testified that in August of that year, at his request, she took the will from the box and gave it to him, and that he tore it in pieces and returned it to her, and directed her to put the pieces in the fire, and her testimony was confirmed by that of her brother-in-law, who claimed to have been present; it was, nevertheless, held that from the improbability of the story and other testimony by letters written by the deceased, a counter presumption arose that the tearing was not done by him or with his knowledge, and that therefore there was no revocation (b).

5. And where the testatrix became insane, and the will was in her custody as well before as after she became so, the will being torn or destroyed, it was held that the burden of showing that the revocation was done, not after the testatrix became insane, but when she was of sound mind, is cast on those who set up the revocation (c). The same principle was acted upon in *Sprigge v. Sprigge* (d), where the will could not be found after the testator's death.

(a) *Finch v. Finch*, L. R. 1 Prob. 371; 16 L. T. N. S. 268; 36 L. J. Prob. 78. See also *Podmore v. Whatton*, 3 S. & T. 449; 33 L. J. P. 143; 10 L. T. N. S. 754.

(b) *Staines v. Stewart*, 8 Jur. N. S. 440; 2 S. & T. 320; 31 L. J. P. 10; 1 Redf. Wills, 331, 332. See

also *Patten v. Poulton*, 1 S. & T. 55; 4 Jur. N. S. 341; 27 L. J. P. 41.

(c) *Harris v. Berrall*, 1 S. & T. 153.

(d) L. R. 1 Prob. 608; 38 L. J. P. 4; 19 L. T. N. S. 462.

6. After the due execution of a will has been proved, BOOK IV.
 the burden of proving that it was revoked lies upon those CHAP. VIII.
 who set up the revocation; and in the absence of evidence
 revocation will not be presumed. Thus, where, in Eng-
 land, a will duly executed before the passing of the Wills
 Act, and remaining in the custody of the testator until his
 death, was found with his signature crossed out—a mode
 of revocation which was formerly effectual—and there was
 no evidence as to the date when the crossing out was
 done, the Court refused to presume that it was done be-
 fore 1838, and therefore pronounced for the will (a). If,
 therefore, the words “otherwise destroying,” in the 5th
 section of our Act, 32 Vict. c. 8, must receive the same
 narrow construction as the same words in the 20th section
 of the English Act, the principle of this decision will, in
 this Province, be applicable to all wills made before the
 passing of our Act (19th December, 1868), by persons who
 have died since the 1st day of January, 1869 (b).

7. The same principles apply to mutilations as to alter-
 ations and interlineations in a will; so that, if no evi-
 dence can be given as to the time at which they were
 made, it will be presumed that they were made after the
 execution of the document in which they appear; and if
 there is a subsequent testamentary paper to that, after
 the execution of the subsequent paper (c).

8. The declarations of the testator to the fact of re-
 vocation are not admissible, except made at the time, as
 part of the transaction, and in connection with and ex-

(a) *Benson v. Benson*, L. R. 2 & T. 153; *Sprigge v. Sprigge*, L.
 Prob. 172; 40 L. J. P. 1; 23 L. T. R. 1 Prob. 608; 38 L. J. P. 4; 19
 N. S. 709. L. T. N. S. 462.

(b) 32 Vict. c. 8, s. 6. See also In (c) *Christmas v. Whinyates*, 3 S.
 the goods of *Streaker*, 4 S. & T. 192; & T. 81; 9 Jur. N. S. 283; 32 L. J.
 28 L. J. P. 50; *Harris v. Berrall*, 1 S. P. 73; 8 L. T. N. S. 801.

BOOK IV. planatory of the purpose of his acts (a). But such declarations were held admissible in a recent case to rebut the presumption of revocation, from the will not being found at the testator's decease (b).

9. A will lost or destroyed, *sine animo revocandi*, may be proved by the instructions, or by a copy, or by the recollection of persons who heard it read over (c). Thus where the will of a testator was, after his death, torn by his eldest son, the Court established the will upon parol evidence of the contents, and some evidence furnished by some pieces of the will which had been preserved (d).

10. The Court regards evidence of the loss or destruction of a will with great distrust, and requires strict proof that the will was in existence after the testator's death (e), and was duly executed, and that the circumstances of the loss or destruction should be explained (f).

(a) *Staines v. Stewart*, 2 S. & T. 320; 8 Jur. N. S. 440; 31 L. J. P. 10; *Doe v. Palmer*, 16 Q. B. 747: per Lord Campbell, p. 757. See also as to the effect of statements made by the testator regarding his will, *Johnson v. Lyford*, L. R. 1 Prob. 546; 37 L. J. P. 65; 18 L. T. N. S. 769; In the goods of *Ripley*, 1 S. & T. 68; 4 Jur. N. S. 342; *Quick v. Quick*, 3 S. & T. 442; 10 Jur. N. S. 682; 33 L. J. P. 146; 12 W. R. 1119; 10 L. T. N. S. 619; *Bessey v. Bostwick*, 13 Grant, 279.

(b) *Whitely v. King*, 17 C. B. N. S. 756; 10 Jur. N. S. 1079; 11 L. T. N. S. 342.

(c) Taylor Evidence, 430; *Brown v. Brown*, 8 E. & B. 886; 4 Jur. N. S. 163; 27 L. J. Q. B. 173. See S. C. 1 S. & T. 32; 4 Jur. N. S. 244; 27 L. J. P. 20; *Wood v. Wood*, L. R. 1 Prob. 309; 15 L. T. N. S. 593; 36 L. J. P. 34; In the goods of *Langtry*, 1 N. R. 194; In the goods of *Pechell*, 6 Jur. N. S. 406; In the goods of *Gardner*, 1 S. & T. 109; 27 L. J. P. 55. But see *Wharram v. Wharram*, 3 S. & T. 301; 33 L. J. P. 75; 10 L. T. N. S. 163; 10 Jur. N. S. 499; *Bessey v. Bostwick*, 13 Grant,

279; In the goods of *Thomas*, 25 L. T. N. S. 509; 20 W. R. 149 P.; In the goods of *Brining*, 22 L. T. N. S. 630.

(d) *Foster v. Foster*, 1 Add. 462. See also *Knight v. Cook*, 1 Cas. temp. Lee, 413; *Podmore v. Whallon*, 3 S. & T. 449; 10 L. T. N. S. 754; 33 L. J. P. 143; In the goods of *Colman*, 14 W. R. 291; 13 L. T. N. S. 682. In a doubtful case our Court of Chancery will direct a bill to be filed in order to try the rights of the various parties: *Bessey v. Bostwick*, 13 Grant, 279.

(e) But in *Bessey v. Bostwick*, sup., the Court established a lost will without requiring such proof.

(f) *Quick v. Quick*, 3 S. & T. 442; 10 Jur. N. S. 682; 33 L. J. P. 146; 10 L. T. N. S. 619; *Moore v. Whitehouse*, 3 S. & T. 567; 34 L. J. P. 31; *Burls v. Burls*, L. R. 1 Prob. 472; In the goods of *Barber*, L. R. 1 Prob. 267; *Hayes & Jarm. Wills*, 36 n. (2.) And see *Berthon v. Berthon*, 18 L. T. N. S. 301, where it was sought to have an existing will declared revoked by a will which was not forthcoming.

And the evidence to establish the contents of an absent will must be such as leaves the mind free from all reasonable doubt. The Court will therefore refuse to declare the contents of a lost will on the unsupported evidence of one witness, who is related to the person benefited by the will (a). Evidence of the declarations of an alleged testator as to the contents or factum of a will not forthcoming, made after its execution, is not admissible to prove the contents (b).

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11. In a late case, in which it was sought to establish the factum and contents of a missing codicil, of which no copy had been preserved, the purport of the codicil was proved by the intervener and the legal adviser of the testator, both of whom had read the document, and they proved that it had been attested by two females. The witnesses remembered signing a paper, but they could not say what the nature of the paper was. One of the witnesses was in the habit of witnessing papers for the testator. The Court did not consider this evidence sufficient proof of the factum, and refused probate (c).

12. Where a will had been left in the custody of a solicitor, but could not be found in his depositories, an entry in the books of the solicitor, in his handwriting, to the effect that he had prepared the will and attested its execution, and been paid his charges, was, after the death of the solicitor, admitted as evidence of the execution of the will (d).

13. When a will has been lost, and evidence of its contents is supplied by the production of a draft and of the

(a) *Bessey v. Bostwick*, 13 Grant, 279. See also *Cutto v. Gilbert*, 9 Moo. P. C. 131, where it was sought to establish a revocation of a will by a subsequent will not forthcoming.
(b) *Quick v. Quick*, 3 S. & T. 442; 10 Jur. N. S. 682; 33 L. J. P. 146;

10 L. T. N. S. 619; In the goods of *Ripley*, 1 S. & T. 68; 4 Jur. N. S. 342.
(c) *Crickett v. Field*, 19 W. R. 232; 23 L. T. N. S. 630 P.
(d) In the goods of *Thomas*, 20 W. R. 149; 25 L. T. N. S. 509.

BOOK IV. parol testimony of persons who had read the will, the
 CHAP. VIII. parol evidence must be placed side by side with the draft,
 and out of them the Court will extract the contents of
 the will to be proved (a).

14. The verbal declarations of a testator at the time
 when he made his will, respecting his will, and letters
 written at that time, are admissible as evidence of the
 contents of the will, if it be lost, the factum of the will
 being proved (b).

15. It is not necessary for the parties seeking probate,
 having proved the factum of the original instrument, and
 given sufficient secondary evidence of its contents, to
 show how the original instrument was in fact destroyed
 or lost (c).

16. The Surrogate Courts Act (C. S. U. C. c. 16) pro-
 vides (d) that the office of the Registrar of every Surro-
 gate Court shall be a depository for all wills of living
 persons given to such Registrar for safe keeping; and all
 persons may deposit their wills in such depository upon
 payment of such fees and under such regulations as may
 from time to time be directed by rules or orders in that
 behalf made under that Act.

(a) *Burls v. Burls*, L. R. 1 Prob.
 472.

(b) *Johnson v. Lyford*, L. R. 1
 Prob. 546; 37 L. J. P. 65; 18 L.
 T. N. S. 769.

(c) *Patten v. Poulton*, 1 S. & T.
 55; 4 Jur. N. S. 341.

(d) S. 73.

CHAPTER IX.

OF REVOCATION BY ALTERATION OF ESTATE AND BY VOID CONVEYANCES.

1. Nature of this revocation. It is not properly a revocation.
2. Old rule that an alienation of lands revoked a devise.
3. Revocation by alienation may be total or partial.
4. The revocation is effected though the conveyance be for a limited object, &c.
5. The same rule followed in the Courts of Equity as to equitable estates.
6. Exceptions to the rule—cases of partition and cases of mortgage.
7. Qualification of the latter exception.
8. Where a man purchases by parol contract, supplemented by part performance, and devises, and accepts a conveyance according to terms of purchase, there is no revocation; but if the estate conveyed is different, there is.
9. A valid agreement to convey is a revocation.
10. A void conveyance will operate as a revocation.
11. Lord Kenyon's statement of the reason of this doctrine.
12. True explanation of the doctrine.
13. Conveyance to charitable uses, which is void, does not revoke.
14. A deed void in equity but not at law was a revocation. Lord Thurlow's decision in *Hawes v. Wyatt* more consonant to reason.
15. Case of *Loughead v. Knott* in our own Court. Construction of Con. Stat. U. C. c. 82, s. 11.
16. Judgment of V.-C. Mowat.
 - (a) Condemnation of the principle of the doctrine.
 - (b) Its abolition by 1 Vict. c. 26, in England.
 - (c) Statement of the doctrine.
 - (d) C. J. Eyre's statement of the law.
 - (e) Lord Hardwicke's explanation in *Parsons v. Freeman*.
 - (f) Some cases go even further.
 - (g) C. J. Wilmot's statement of the law.
 - (h) Rule applies though there is no change of seisin.
17. Law altered by Stat. Ont. 32 Vict. c. 8, s. 2. Provisions of "The Wills Act, 1873."
18. Construction placed on 1 Vict. c. 26, s. 23, by the English Courts.
19. Case of *Ford v. De Pontes*.
20. Judgment of the Master of the Rolls in that case.
21. Construction of the concluding words of the section.
22. Case of *Gale v. Gale* stated.

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1. It is not purposed in this work to discuss with much particularity the law relating to revocation by alteration of estate. Strictly speaking, what is termed a revocation by alteration of estate is merely a withdrawal, by alienation, from the operation of the will, of real estate of which the testator was seized at the time of making the will; and it is founded upon the technical rule, which has been previously noticed, that a will could not pass any interest in freeholds of which the testator was not seized at the time of making the devise.

2. Formerly, if a testator, subsequently to his will by deed, aliened lands which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void (a). This rule of law is described by Sir W. Page Wood, V.-C. (b), as "that law, now happily obsolete, by which, with a sort of remorseless logic, any person who had once made a will, and afterwards disposed of his interest for any purpose whatsoever, even although he might get back the identical estate which he parted with, was held to have revoked his will, and Equity could not give any assistance except in the single case of a mortgage."

3. A revocation by alienation may be total or partial. Thus, if a testator, seized in fee, made a devise of such fee and afterwards carved out of the fee simple a particular estate, which he conveyed to another, the devise was revoked as to the particular estate thus aliened, but was no further disturbed (c). When, however, the conveyance subsequent to the devise, though made for a partial purpose, embraced the entire fee simple or the whole estate

(a) 1 Jarm. Wills, 136; *Goodtitle d. Holford v. Otway*, 7 T. R. 399; 2 H. Bl. 516; 1 B. & P. 576. (i) *Grant v. Bridger*, L. R. 3 Eq. 352; 36 L. J. Ch. 377. (c) 1 Jarm. Wills, 137.

of freehold which is the subject of the devise, the rule under the old law (with some exceptions) is, that the conveyance, though limited in its purpose and though it instantly reverts the estate in the testator, produces a total revocation (a).

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4. And though the conveyance of a freehold estate had no definite or limited object, or was made for a mistaken or unnecessary purpose, and though its whole effect was instantly to revert the property in the testator himself, who was in of his old estate; yet the momentary interruption of the testator's seisin thus occasioned, produced a complete and total revocation of the previous devise (b).

5. It is illustrative of the fidelity with which the Courts of Equity adhered to the maxims laid down by them, that in obedience to the rule that equity follows the law, the doctrine of revocation by alteration of estate was applied by the Courts to equitable estates. Thus, where a testator devised lands, then mortgaged them in fee, and afterwards, in contemplation of marriage, conveyed the devised lands to the use of himself and his heirs until the intended marriage, and after such marriage to other uses; though the marriage did not take place, yet the devise was held to be revoked (c).

6. The exceptions to the rule that a conveyance in fee of freehold lands, executed for a partial purpose, formerly

(a) 1 Jarm. Wills, 138; *Goodtitle v. Otway*, 2 H. Bl. 516; 1 B. & P. 576; 7 T. R. 399; 2 Ves. 606 n.; *Care v. Holford*, 3 Ves. 650; 7 B. P. C. Toml. 593. See also *Vasser v. Jeffery*, 16 Ves. 519; 2 Sw. 268; *Briggs v. Watt*, 2 Jur. N. S. 1041; *Walker v. Armstrong*, 21 Beav. 284; on app. 25 L. J. Ch. 738; *Power v. Power*, 9 Ir. Ch. Rep. 178.

(b) 1 Jarm. Wills, 138; *Burgoine v. Fox*, 1 Atk. 575. See also *Darley v. Darley*, 3 Wils. 6; Amb. 653; S. C. nom. *Darley v. Langworthy*, 3

B. P. C. Toml. 359; *Harmood v. Oglander*, 8 Ves. 106; *Sparrow v. Hardcastle*, 3 Atk. 796.

(c) *Earl of Lincoln's case*, Show. P. C. 154; 1 Eq. Ab. 411, pl. 11. (In the latter report the mortgage is stated to have been previous to the will, but this makes no difference in the principle established by the case.) 1 Jarm. Wills, 138 n. (k). See also *Pollen v. Huband*, 1 Eq. Ab. 412; 7 B. P. C. Toml. 433; *Lock v. Foote*, 5 Sim. 618.

BOOK IV. revoked a devise, are stated by Mr. Jarman to be (a):

CHAP. IX. 1st. Where tenants in common or coparceners partition, in which case, by whatever kind of assurance the partition is effected, a prior devise by a tenant in common is not revoked, even at law, provided the conveyance be confined to the object of the partition, merely assuring to the testator in the lands allotted to him in severalty an estate precisely correspondent to that which he previously had in his undivided share (b). 2nd. Where a testator subsequently to his will makes a mortgage of the devised lands, which, it is said, revokes the will in equity *pro tanto* only (c).

7. The latter exception is, however, qualified by that learned writer, who says with regard to it, that to designate a mortgage a revocation *pro tanto*, was, before the English Statute 17 and 18 Vict. c. 113 (d), inaccurate, and tended to create an erroneous impression of its actual effect on the rights of the persons claiming through the testator; for the phrase might seem to import that the transaction was viewed in the light of an intentional withdrawing by the testator of his bounty to the extent of the mortgage, in which case the devisee would have taken the property *cum onere* as against not only the mortgagee creditor, but also as against the testator's own representatives, in the same manner as if the testator had created the charge by his will; but this was not the case, for, unless a contrary intention appeared, the devisee, it is well known, was entitled to have the estate disencumbered out of the personal estate of the testator not

(a) 1 Jarm. Wills, 140.

(b) *Luther v. Kidby*, 3 P.W. 169 n.; 8 Vin. Ab. 148, pl. 30; *Risley v. Baltinglass*, T. Raym. 240; *Webber v. Temple*, 1 Freeman. 542; *Barton v. Croxall*, Toml. 164.

(c) *Hall v. Dench*, 1 Vern. 329, 342; *Perkins v. Walker*, 1 Vern. 97.

(d) See Statute of Canada 29 Vict. c. 28, s. 33, amended by Stat. Ont. 35 Vict. c. 15, ss. 1 and 2.

specifically bequeathed (a). It was a perversion of language therefore to call a mortgage a revocation *pro tanto*; in short, the term is very inaptly applied in any of those cases in which the devise is defeated by the testator's subsequent disposition by deed of the devised property, which are all examples of ademption rather than of revocation (b).

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8. Where the testator contracted for an estate, and, after going into possession and part performance of the contract, so as to take the case out of the Statute of Frauds in Equity, devised the same, and subsequently accepted a conveyance precisely according to the contract, it did not operate as a revocation (c). But if the estate conveyed was different in any essential particulars from that provided for in the contract, it operated as a revocation of the devise (d). So also, in all cases where the estate was varied in any essential particular by the testator, although not done with any expectation of revoking the devise, it would nevertheless have that effect (e).

9. A valid agreement or covenant to convey, which a Court of Equity would specifically enforce, was operative in Equity as a revocation of a former devise of the same estate. This rule is maintained in Equity upon the ground that, from the date of the contract, the estate was regarded as the real estate of the vendee, the same as if it had been conveyed (f). Where the testator had bequeathed all his property to his wife, a subsequent conveyance of a portion of the testator's real and personal

(a) *Warner v. Hawes*, 3 R. P. C. Toml. 21.

(b) 1 Jarm. Wills, 140, 141.

(c) 1 Jarm. Wills, 145.

(d) *Ward v. Moore*, 4 Mad. 368.
Bullin v. Fletcher, 1 Keen. 369; 2 My. & Cr. 432.

(e) *Sparrow v. Hardcastle*, 3 Atk.

798; S. C. Amb. 224; 1 Jarm. Wills, 138, 139.

(f) 4 Kent Comm. 528; *Cotter v. Loyer*, 2 P. W. 623; *Rider v. Wager*, Ib. 382; *Mayer v. Gowland*, Dickens, 563; *Knollys v. Alcock*, 5 Ves. 654; *Vawser v. Jeffery*, 2 Sw. 268.

BOOK IV. estate to trustees, for the use of his wife, was held not to
 CHAP. IX. amount to a revocation of the bequest (a).

10. An instrument purporting to be a conveyance, but incapable of taking effect as such, might nevertheless operate to revoke a previous devise, on the principle, as it should seem, that the attempted act of conveyance was inconsistent with the testamentary disposition; and therefore, though ineffectual to vest the property in the alienee, it produced a revocation of the devise. The rule obtained wherever the failure of the conveyance arose either from the incapacity of the grantee, or from the want of some ceremony which was essential to the efficacy of the instrument.

11. Lord Kenyon, in the case of *Shove v. Pincke* (b), places this doctrine upon the ground that the conveyance was intended to operate as a revocation of the will. "If," he says, "it demonstrates an intention to revoke the will, it amounts in point of law to a revocation."

12. It is submitted, however, that the doctrine in question is seldom based upon an intention to revoke, but is the offspring of pure technicality. It is true, that a testator, in attempting to alienate land which he has devised, must, in a certain sense, intend to withdraw that land from the operation of the devise; but that intention is merely dependent upon the intention to convey. If, therefore, the intention to convey be defeated, it would seem that the dependent intention should be defeated also. There seems to be no good reason why the principles on which the doctrine of dependent relative revocation is based, should not be applied to their fullest extent, to prevent the revocation of a devise by a void conveyance.

13. A conveyance to charitable uses, which could not

(a) *Clingan v. Mitcheltree*, 31 Penn. St. 25. (b) 5 T. R. 124.

operate on account of the Statute of Mortmain (a), the grantor having deceased within twelve months of the date of the conveyance, did not revoke a prior devise of the same estate (b). So also a deed made by one under personal disability, as a feme covert, did not operate to revoke a devise (c). But a feme covert who had a power of appointment either by will or deed, and who made a will in execution of such power, might afterwards by deed revoke such execution, she having become a feme sole by the death of her husband (d).

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14. It has been decided that a deed executed under circumstances which render it void in Equity, but not at Law, was a revocation of a former will devising the same estate (e). But the decision of Lord Thurlow in *Hawes v. Wyatt* (f) seems more consonant to reason. In that case he held that if a deed were so void in Equity that the Court must decree its surrender, it could not be held to operate as a revocation of the former devise of the same estate. His Lordship says: "Whoever orders it to be delivered up declares it to be no deed." And it seems admitted that if a deed is fraudulent, so as to be void at law, it can have no operation by way of revocation, and this we think the true rule in regard to all ineffectual deeds, which do not contain an express and formal revocation. If the deed is void or inoperative as a deed, it should not be allowed an incidental operation by way of

(a) 9 Geo. 2, c. 36.

(b) *Mathews v. Venables*, 9 J. B. Moo. 286; 2 Bing. 136.

(c) *Kilbeck v. Wood*, 1 Russ. 564.

(d) *Lawrence v. Wallis*, 2 Br. C. C. 3191. This was decided upon the ground that the deed was the real execution of the power, but no stress is laid upon the fact of the decease of the husband.

(e) *Simpson v. Walker*, 5 Sim. 1. The Vice-Chancellor, Sir Launcelot Shadwell, here reviews the

former cases, and decides in conformity with the cases of *Hick v. Mors*, Amb. 215; *Hawes v. Wyatt*, 2 Cox, 263; and the dictum of Lord Eldon in *Attorney-General v. Vigor*, 8 Vesey, 283; but goes counter to the decision of Lord Thurlow in *Hawes v. Wyatt*, 3 Br. C. C. 156, where the decision of Lord Alvanley is reversed by the Lord Chancellor: 1 Redf. Wills, 343, 344, n. 8.

(f) 3 Bro. C. C. 156.

BOOK IV. revocation (a). A deed executed for an immoral consid-
 CHAP. IX. eration, it has been held, will not revoke a devise of the
 same land (b).

15. In a late case in our Court of Chancery (c), the question arose whether the provisions of Con. Stat. U.C. c. 82, s. 11, had changed the old law regarding revocation by alteration of estate. In that case, a testator devised 200 acres of his land to one of his sons, a minor, and the remainder (100 acres) to his (the testator's) wife. Subsequently, conveyances were executed by which the 300 acres were conveyed to a trustee, the wife releasing her dower, and in consideration of such release, the trustee conveyed to the wife 100 acres absolutely, and executed a declaration of trust, whereby he agreed to convey the remaining 200 acres as the husband should appoint; it was held that, notwithstanding the provisions of the Act referred to, the devise of the 200 acres was revoked by the conveyance.

16. The law is clearly stated by Mowat, V.-C. (atp. 36). He says, "The question is, whether the deed of the 26th February, 1867, is a revocation of the will. Previously to the Act of 1834 (d), that, no doubt, would have been the effect of the deed (e). No one imagines that the testator, in executing the deed, had any intention of revoking his will: the contrary is admitted. And as Lord Mansfield observed in *Doe v. Pott* (f), 'All revocations which are not agreeable to the intention of the testator, are founded on artificial and absurd reasoning. The absurdity of *Lord Lincoln's case* (in which the rule had been applied) is shocking. However, it is now law.'

(a) 1 Jarm. Wills, 154.

(b) *Ford v. De Pontes*, 30 Beavan, 572.

(c) *Loughead v. Knott*, 15 G 34.

(d) 4 W. 4, c. 1, s. 49; Con. Stat. U. C. c. 82, s. 11, p. 831.

(e) *Kenyon v. Sutton*, 2 Ves. 601; *Plowden v. Hyde*, 2 Sim. N. S. 174; 1 Jarm. Wills, 136.

(f) Doug. 722.

(a) "Most persons nowadays concur with those great authorities (who) have lamented that a will should be defeated by an Act that does not necessarily mark that intention; and all persons competent to form an opinion would probably agree that the rule which makes a deed like that in question to operate as a revocation of the grantor's will, depends on subtle reasoning; and that if it was entire, it would not now be decided, and it would be better if it never had been so decided (a).

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(b) "The English Parliament has since, by express enactment, abolished the rule (b); and it never had any application where the testator's interest was leasehold instead of freehold (c), though the leasehold should be of 1,000 years. The English enactment has not yet been adopted in this country; but from what I recollected of some of the cases, in which the foundation of the rule is stated, I thought it right to defer my judgment until I should have an opportunity of considering, in view of the authorities, whether the rule should not be held to have been impliedly abrogated by the enactment rendering after-acquired freeholds devisable. My conclusion, after looking into the authorities, is, that I cannot so hold; and I shall state what has occurred to me on the point, that I may not hereafter be supposed to have overlooked it.

(c) "The terms of a deed may be so inconsistent with the provisions of a prior will, that an intention to revoke may reasonably be inferred from the deed; and, in such a case, the deed is held to have that operation, though the deed should be incapable of taking effect as a conveyance (d). But the rule obtains even where, as in the present instance, there cannot be said to be such an in-

(a) See 2 Ves. 427.

(b) 1 Vict. c. 26, s. 23.

(c) *Woodhouse v. O'Kell*, 8 Sim.

(d) 1 Jarm. Wills, 153.

BOOK IV. consistency; and in such cases the rule is often put on
 CHAP. IX. the ground that the Statute of Wills authorized the devise of existing estates only (a). Thus Lord Eldon explained in *Harmood v. Oglander* (b): 'By the mode of doing it, he parts with the estate; and, therefore, has not the estate in the terms of the Statute of Wills.'

(d) "The reasoning was more fully stated by Lord Chief-Justice Eyre: 'By a construction on the Statute of Wills, a will can only operate on those estates which the testator had at the time of making the will: and therefore, in pleading, it must be stated that the party was seized, that he made his will, and thereby devised the lands, and that he afterwards died so seized. If, therefore, the estate had been parted with after the making of the will, but comes back again to the testator with modifications of the whole interest in it; or if he should afterwards take the whole estate back again by purchase, the will could not operate on the new estate independent of the law of revocation. The new modified estate, strictly speaking, is not the same estate; and the very same quantity of estate newly acquired, suppose it were a fee simple, is not that fee simple which the testator had at the time of making his will,' &c., &c. (c).

(e) "But I cannot say that the rule is always put on this ground and no other. In *Parsons v. Freeman* (d), for example, Lord Hardwicke explained the doctrine thus: 'Determinations in cases of revocations of wills have always been favourable to the heir-at-law. It is admitted on all hands, that if the testator had had a legal fee, devised it, and afterwards suf-

(a) See *Cave v. Holford*, 3 Ves. 650, and the authorities there cited.

(b) 8 Ves. 126.

(c) *Goodtitle d. Cave v. Otway*, 1 B. & P. 595.

(d) 1 Wils. 316; S. C. 3 Atk. 747.

ferred a recovery, it would have amounted to a revocation of his will ; or, if the recovery had been declared to be to such uses as he should direct, and for default thereof to the testator in fee, that this would also have amounted to a revocation ; and it is as certain, likewise, that if a man seized in fee devises, and afterwards conveys the same away by any legal conveyance whatever, and takes back again a new estate, this would be a revocation of the devise.'

(f) " But there are cases which go further ; for, if one seized in fee devises, and after levies a fine to his own use in fee, this has always been held a revocation, though the testator is in of the old use. This is a prodigious strong case. The reason is, that Courts of justice, in favour of the heir, will presume that the testator had some intention to alter or revoke his will in favour of the heir, by such an act done after the will.

(g) " Chief-Justice Wilmot, in *Darley v. Darley* (a), stated the rule and the principle of it in the same way : ' It seems to be clear, from the latest determinations on this subject, that if a man be seized in fee, makes his will and devises, and afterwards conveys by recovery, fine, feoffment, release, &c., and takes back the same or a different estate, it shall amount to a revocation. The reason is, it must be presumed that he intended to alter his will.'

(h) " I need not quote from other cases. The rule is held to apply, though by the conveyance there was no change of seisin (b), and though the estate of the testator was, and continued to be, equitable only (c), the rule having always been held to be binding in Courts of Equity as well

(a) 3 Wils. 13.

(b) *Langford v. Little*, 2 J. & L. 632.

(c) *Earl of Lincoln's case*, Show. 154 ; 1 Eq. Cas. Ab. 411, pl. 11 ; *Lock v. Foote*, 5 Sim. 618.

BOOK IV. as Courts of Law (a), except in certain cases of mortgage
 CHAP. IX. and partition, not applicable to the present case. I must,
 therefore, hold the deed to Knott to have revoked the will,
 so far as relates to the lands comprised in that deed. I
 hope that the anomaly which compels this decision may
 soon be removed by the Legislature."

17. It was no doubt in pursuance of the recommendation of the learned judge, that the revocation of devises by alteration of estate, and by void conveyances, was placed on a new footing by the late Statute 32 Vict. c. 8, by the 2nd section of which it is enacted that "no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised (except an act by which the will is revoked), shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death." The Statute 32 Vict. c. 8, is repealed by "The Wills Act, 1873," as to wills made on or after the 1st January, 1874, but the 2nd section of the repealed Act is re-enacted by the 20th section of the new Statute. The 23rd section of the English Act 1 Vict. c. 26, from which the 2nd section of our Act 32 Vict. c. 8, and the 20th section of "The Wills Act, 1873," have been adopted, has received the consideration of the English Courts on several points.

18. It has been held in England that a will made before the passing of the Act, is revoked by a deed executed subsequently to the passing of the Act which disposed of the estate devised by the will, though the testator became seized again of the same estate (b).

(a) See *Parsons v. Freeman*, 1 Wils. 311; *Brydges v. Duke of Chandos*, 2 Ves. 417; *Sparrow v. Hardcastle*, 3 Atk. 802.

(b) *Langford v. Little*, 2 J. & L. 613; *Walker v. Armstrong*, 21 Beav. 284; *Cowper v. Mantill*, 22 Beav. 223, 231.

19. Where, subsequently to the Statute, a testatrix by her will devised freehold lands, and by a subsequent deed, attested by two witnesses, she conveyed them upon other trusts, and such deed was void, being *turpis contractus*; it was contended that the deed operated as a revocation of the will, being an instrument showing an intention to revoke duly executed; but it was held by the Master of the Rolls that the deed had no such effect (a).

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20. The learned judge thus stated his reasons for the conclusions at which he arrived (b): "The question depends on the Wills Act, 1 Vict. c. 26, and it has been observed that under the construction of that Statute, so far as it affects this case, the disposition by will can only be revoked either by some writing declaring an intention to revoke the will, or by ademption, that is to say, by taking away the subject matter of the devise. The two modes may be illustrated thus:—If a person devise Whiteacre to A., and he afterwards signs a paper, attested by two witnesses, in which he says, 'I wish to alter my will, and I declare that the devise to A. shall not stand,' or, 'I wish that my will shall be revoked,' this would no doubt operate as a revocation. Again, if the testator sells or parts with Whiteacre, and does not possess it at his death, then there is nothing on which the will can operate. But it has been contended that by 1 Vict. c. 26, s. 20, the deeds operate for the purpose of showing an intention to revoke the will, and that the two deeds profess to deal with the property, by appointment, in a totally different manner from that in which the testatrix has dealt with it by her will; that although the same person is to take under the will, still it is a new disposition, and inseparable from an intention to revoke the will. But without, therefore, re-

(a) *Ford v. De Pontes*, 30 Beav. 572.

(b) At page 592.

BOOK IV. ferring to *Onions v. Tyrer* (a), and the other cases which
CHAP. IX. lay down that no codicil or subsequent will is effectual to
 revoke a former will, unless that revoking instrument is
 valid of itself—because revocation fails if the particular
 purpose for which it is made fails—without, I say, referring
 to that principle, I am of opinion that this question is
 concluded by the Wills Act, 1 Vict. c. 26. One great object
 of that Statute was to put an end to all those questions
 which previously arose where a devise was destroyed by
 the alteration of the estate of the testator. This is dis-
 tinctly pointed out by the 23rd section, which states that
 no conveyance or other act subsequent to the execution of
 a will shall prevent its operation on the interest therein
 which the testator may have at his death. Therefore, all
 those cases in which it was formerly held that a will was
 revoked by an alteration of the estate of the testator, are
 now put an end to by this section of the Act, and a will
 can only be revoked by marriage, by express declaration
 in writing, or by burning, &c. By express declaration, I
 do not mean that the words must be ‘I do declare that I
 intend to revoke my will,’ but that any equivalent words
 which amount to that will be sufficient. If I held other-
 wise, I should be merely reviving the old system of law,
 for it is impossible not to see that the arguments used in
 the present case would equally apply to all the other
 cases which were determined previously to the Statute,
 and which are expressly put an end to by it. It has been
 argued that Mrs. Dolphin revoked her will, because she
 again executed her power of appointment, and that such
 an execution is inconsistent with the intention that the
 will should stand, and that such new execution of the
 power at once contemplated the creation of a new and

(a) 1 P. W. 343.

indefeasible estate and interest in a stranger. But what can be more inconsistent with the intention that a will should stand than where the testator conveys the devised property to trustees on certain trusts which fail? It is obvious that when he was executing the deed, he intended the will to be revoked, in order that the trusts of such deed might be carried into effect. That, however, is one of the cases which the Wills Act declares shall no longer be the law, and these are expressly the difficulties which it was intended to remove."

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21. A mere claim for purchase money, with a lien on the estate for its payment, is not such an interest in the estate as is contemplated by the concluding words of the 2nd section of 32 Vict. c. 8, and the 20th section of "The Wills Act, 1873" (a). But where a testator has given an option to A. to purchase an estate of the testator's after his death, which option is accepted, and the purchase completed, the purchase money, if the estate be specifically devised, devolves, according to the limitations of the will, in the same way as the estate would have done, in case A. had not decided to purchase (b).

22. Real estate was conveyed to trustees, upon trust, after certain life estates, for such persons as A. should by deed or will appoint, and, in default, for the children of five persons named. The trustees were empowered, with the consent of the life-tenants, to sell the settled property, and invest the proceeds in other real estate to be settled to the same uses. A., in exercise of his power, by will dated in 1846, appointed the settled estate to trustees, upon trust to sell and to pay the proceeds to the children of B., and he devised all other his real estate, not therein-

(a) *Farrar v. Earl of Winterton*,
5 Beav. 1. See also *Moor v. Raisbeck*,
12 Sim. 123.

(b) *Emus v. Smith*, 2 De G. & S.
722.

BOOK IV. before specifically disposed of, to his wife. In 1849, the
CHAP. IX. trustees of the settlement, with the requisite consents,
sold the settled estate ; but on the death of A., which took
place in 1850, the purchaser's conveyance was not executed by one of the trustees, and the purchase money was unpaid. It was held that there was an ademption ; that the appointment by the will of A. had no effect either on the new estate to be purchased with the produce of the settled estate, or on the purchase money which stood in its place ; and that the widow and residuary legatee of A. was entitled to the purchase money of the settled estate (a).

(a) *Gale v. Gale*, 21 Beav. 349.

BOOK THE FIFTH.

OF REPUBLICATION, REVIVAL, ETC.

CHAPTER I.

OF REPUBLICATION AND REVIVAL.

1. Provisions of 1 Vict. c. 26, as to republication. "The Wills Act, 1873," contains similar provisions.
2. Republication is of two kinds, express and constructive.
3. A will of real estate could not under the Statute of Frauds be republished, except by re-execution in presence of three attesting witnesses, or by the regular execution of a codicil. But a will of personalty could be republished by parol.
4. A revoked will of personalty may be revived by recognition as a valid will.
5. Mere conservation of a will considered by Sir John Nicholl sufficient to revive it.
6. The act done must be *animo republicandi*.
7. Declarations are sufficient to revive a will found with an existing revoking will. Case of *Daniel v. Nockolds*.
8. A will actually cancelled may be revived if recognized *animo republicandi*.
9. Examples—cases of *Slade v. Friend*, and *Brotherton v. Hellier*.
10. A codicil is a republication of a will.
 - n. (c) A will containing a devise, but not duly attested, may be republished by a codicil duly executed.
11. The question is always whether the particular case is within the general rule.
12. The republication of a will amounts to a making of the will *de novo*.
13. Difference between wills and codicils in this respect.
14. Case of *Upfill v. Marshall*.
15. The will when republished extends to subjects arising between its date and republication.
16. An infant, on attaining majority, may adopt a will made during infancy—so a will made by a testator while *non compos*, may be adopted by him when sane.
17. Wills made before 1st January, 1874, must be executed in accordance with the new statute, in order to duly republish them.

18. Question whether, if a revoking will is cancelled, the former revoked will is revived, unsettled. The Common Law Courts adopted the affirmative opinion, the Ecclesiastical Courts the negative.
19. Opinions of Lord Mansfield and Chancellor Kent.
20. Statement of the law by Jarman.
21. Opinion of Sir John Nicholl.
22. Construction of the words "showing an intention to revive," in the 19th section of "The Wills Act, 1873."
 - (a) The question at issue one of construction and of some difficulty.
 - (b) Propositions established by the cases.
 - (c) Evidence should be received of surrounding circumstances.
 - (d) There can be no revival of a destroyed will.
 - (e) Remarks upon the cases.
 - (f) The effect of the Statute considered.
 - (g) Meaning of the words "showing an intention to revive."
 - (h) Discussion upon these words.
 - (i) The result of the documents in each case must be determined from the language of the documents themselves, read in the light of the facts of the case.
 - (j) The language of the codicil must be closely considered.
- n. (b) Judgment of Sir J. P. Wilde In the goods of *Steele*; In the goods of *May*; In the goods of *Wilson*.
23. The revival of a will by a codicil does not necessarily involve the revival of a prior revoked codicil.

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CHAP. I.

1. By the English Statute 1 Vict. c. 26, s. 22, it is provided that "No will or codicil, or any part thereof, *which shall be in any manner revoked*, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, *and showing an intention to revive the same*; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." The provisions of this section were introduced into this Province by "The Wills Act, 1873;" but our present law upon the subject of republication and revival is generally the same as that which existed in England prior to the passing of the Imperial Act. The 19th section of "The Wills Act,

1873," is in the same words as the 22nd section of 1 Vict. c. 26.

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2. Republication is said to be of two kinds, express and constructive; the former consisting in a re-execution of the will, with the formalities necessary to an original execution, and with the view of republishing the will; the latter consisting in the execution of a codicil for some other purpose, in which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will (*a*).

3. The only mode of republishing a will of real estate under the Statute of Frauds (*b*), was by re-executing the will in the presence of three attesting witnesses, or by making and executing a codicil in accordance with the forms prescribed by the Statute (*c*). But the 5th section of the Statute did not apply to wills of personalty, which may be republished by an unattested codicil or other writing, or by the mere parol acts or declarations of the testator (*d*).

4. As no formalities are required by law for the due execution of wills of personalty, it would appear that if a will of personalty which has been revoked or made at some distant period, be afterwards sufficiently recognized by the testator as his operative will, by parol acts or declarations, the will so recognized becomes, as any other written document would, his legal will at the date of recognition (*e*): A will of personalty under the present law (*f*) appears in fact to stand nearly in the same situation as a will of lands did before the Statute of Frauds; it must be in writing by the provisions of the Statute of Wills, but no other formalities are necessary; and we find

(*a*) 1 Jarm. Wills, 178.
(*b*) 29 Car. II. c. 3.
(*c*) 1 Jarm. Wills, 178; 1 Saund.
278; 1 Powell Devises, 609, 3rd ed.

(*d*) 1 Williams Exors. 198.
(*e*) 1 Williams Exors. 199.
(*f*) In 1873.

BOOK V. that before the Statute of Frauds, and after the passing
CHAP. I. of the Statute of Wills, it was holden that a written will
of lands might be republished by parol (a).

5. It was the opinion of Sir John Nicholl in *Long v. Aldred* (b), that the mere conservation of a will of personalty might amount to a republication of it. And where the question involved in the case was, whether a will made by a woman before marriage had been republished by her after marriage, so as to restore its validity, it was held that an acknowledgment of the will by the testatrix to an attendant as a valid and existing will, and her assertion to different persons after the death of her husband that she had a will, naming her executor, and that she intended the will to operate, and that her affairs were to be settled according to the directions contained in such a will, was a sufficient republication (c). And in another case of a similar character, the recognition by a widow, after her husband's death, of a will made before her marriage as an existing will, and its delivery by her to the executor in a box with other papers, with the remark that the box contained her will, were held to constitute a republication so far as the will affected personalty (d).

6. It is essential, however, to the republishing operation of any Act, that it should be done *animo republishandi* (e). And where there are two uncanceled wills of different dates, some direct and unequivocal act of republication is necessary to revive the former and revoke the latter, the presumption of law being in favour of the last dated will being uncanceled (f).

(a) 1 Williams Exors. 199; *Jackson v. Hurlock*, Amb. 494; *Beckford v. Parnecott*, Cro. Eliz. 493; 1 Saund. 277 c. d.; 1 Roll. Ab. 617 (z), pl. 2.

(b) 3 Add. 48.

(c) *Braham v. Burchell*, 3 Add. 264.

(d) *Miller v. Brown*, 2 Hagg. 209.

(e) *Abney v. Miller*, 2 Atk. 599.

(f) 1 Williams Exors. 201; *Stride v. Cooper*, 1 Phillim. 336.

7. Mere declarations have never been held an effectual republication of a will which is found in the same repository with a later uncanceled will containing an express clause of revocation. In *Daniels v. Nockolds* (a), Sir John Nicholl, after stating the facts, observes, "This is not like the case of a later cancelled will, because then the very act of cancellation revokes the latter, and lays a foundation for an inference that the testator intended the former will to operate. But here is a later revocatory will entire, and in force as a revocation of the former, though the devises and bequests may have lapsed. Can the former will be revived without an act of republication, or indeed of re-execution; or rather can the latter will be revoked by mere declarations? If it were merely a will of realty, it clearly could not have been contended that there had been a republication of the former will, because the words of the 6th section of the Statute of Frauds are express. It is clear also under s. 22 that the latter will could not have been revoked by mere declarations unaccompanied by some writing: but here is no declaration in writing; nothing reduced into writing during the deceased's lifetime; nor are there any acts; the circumstances of the finding are too slight—they might be merely accidental. The latter will was in an envelope; and there is no appearance that it was rumpled. Why did not the deceased, a professional man, cancel, if he intended to revoke it, and revive the former will? Declarations without acts are always dangerous evidence: they are frequently insincere—liable to be misapprehended—not accurately recollected. The case of *Miller v. Brown* (b) does not apply. In that case there had been no revocation; all that was required was to

(a) 3 Hagg. 777.

(b) 2 Hagg. 209.

BOOK V. show adherence. In this case there is an express revoca-
 CHAP. I. tion, and that revocation is to be removed by parol—that is the difficulty” (a).

8. Under the present law it would seem that if a will of personalty be actually cancelled it would be considered as republished upon satisfactory proof of recognition, *animorepublicandi*, by the testator, provided it continues legible (b). “If,” says Wentworth (c), “one of the executors’ names be stricken out, and afterwards a *stet* be written over his head by the testator, or by his appointment, now he is a revived executor. So if the testator express by word, in the presence of witnesses, that the party put out shall be executor. But now, I mean where the executor’s name is not so blotted out but that it may be read and discerned, for else the *stet* is upon nothing; and if the verbal re-affirmance should renew his executorship, then must the will be partly in writing and partly nuncupative, his name not being to be found in the written will.”

9. Where the will was found locked up in the deceased’s trunk, of which she kept the key, and it did not appear that anybody had access to it but herself; and the will was fair and entire, except that lines were drawn over the testatrix’s name, Elizabeth Hutton, which was held to be a cancellation; it being proved that she on her death-bed, being asked whether she had made a disposition of her affairs, answered “Yes,” and said it was in that trunk, pointing to the trunk, where it was found; this declaration was held to be a revival of the will (d). So in *Brotherton v. Hellier* (e), the will was found cancelled, the name and seal being torn off. It was doubtful whe-

(a) 1 Williams Exors. 202, 203.

(b) 1 Williams Exors. 203.

(c) Off. Ex. c. 1, p. 65, 14th ed.

(d) *Slade v. Friend*, cited by Sir G. Lee in 2 Cas. temp. Lee, 84.

(e) 2 Cas. temp. Lee, 55.

ther it might have been cancelled by accident, or by the deceased himself: but Sir G. Lee held that the declaration of the deceased, and the giving of orders by him for making a codicil, would have been sufficient to have revived the will, even if it had been certain that he himself cancelled it (a).

10. A codicil is a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will, whether it be so described in such codicil or not; and as such furnishes conclusive evidence of the testator's considering his will as then existing (b). But although the effect of a codicil, as to republication, is not dependent on its being annexed to the will, yet if there are several wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that it was intended as a codicil to the will to which it is annexed and to no other (c). And an inaccuracy in the reference is imma-

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(a) See 1 Williams Exors. 204.
(b) 1 Williams Exors. 204; *Ach-erly v. Vernon*, Com. Rep. 381; S. C. 3 Bro. P. C. 107; *Potter v. Potter*, 1 Ves. Sen. 437; *Jackson v. Hurlock*, Amb. 487; S. C. cited, 1 Ves. 492; S. C. 2 Eden, 263; *Gibson v. Lord Montford*, 1 Ves. Sen. 485; S. C. Amb. 93; *Serocold v. Hemming*, 2 Cas. temp. Lee, 490; *Doe v. Davy*, Cowp. 158; *Barnes v. Crowe*, 1 Ves. 486; S. C. 4 Bro. C. C. 2, overruling *Att.-General v. Downing*, Amb. 573; *Pigott v. Waller*, 7 Ves. 98; *Goodtitle v. Meredith*, 2 M. & S. 5; *Hulme v. Heygate*, 1 Mer. 285; *Rowley v. Eyton*, 2 Mer. 128; *Duffield v. Elwes*, 3 B. & C. 705; *Guest v. Wil-lasey*, 2 Bing. 429; 3 Bing. 614; In the goods of *Crosley*, 2 Hagg. 80; 1 Saund. 278 b, et seq. note to *Duppa v. Mayo*; *Williams v. Goodtitle*, 10 B. & C. 895; *Doe v. Walker*, 12 M. & W. 591; *Skinner v. Ogle*, 1 Rob. 363; S. C. 4 No. Cas. 74; *Doe v.*

Marchant, 6 M. & G. 813, 825; 7 Scott N. R. 644; 8 Jur. 21; 13 L. J. C. P. 59; *Dickinson v. Stidolph*, 11 C. B. N. S. 341; In re *Earle's Trust*, 4 Kay & J. 673. So a will or codicil containing a devise of real estate, but not duly attested, may be republished and made operative by a subsequent codicil having the requisite attestation, though the latter document be in no way annexed to the will or prior codicil. But it has been held that it must distinctly refer to it. See *Doe d. Williams v. Evans*, 1 C. & M. 42; *Utterton v. Robins*, 1 A. & E. 423; *Gordon v. Reay*, 5 Sim. 274; *Aaron v. Aaron*, 3 De G. & Sm. 475. See further as to the effect of a codicil, *Hopwood v. Hopwood*, 7 H. L. C. 740, per Lord Campbell.

(c) *Rogers v. Pittis*, 1 Add. 41; *Barnes v. Crowe*, 1 Ves. 490; 1 Williams Exors. 204, 205.

BOOK V. terial, if there is no doubt as to the will intended to be
CHAP. I. referred to by the codicil (a).

11. But though the general rule as to the republishing operation of a codicil is as above stated, yet in all cases of this kind the question to be considered is, whether the particular case is or is not within the general rule (b); for, if it appears on the face of the codicil that it was not the intention of the testator to republish, the ordinary resumption derived from the existence of the codicil will be counteracted (c).

12. The republication of a will is tantamount to the making of that will *de novo*. It brings down the will to the date of republication, and makes it speak, as it were, at that time. In short, the will so republished is a new will (d). Consequently, upon the ordinary and universal

(a) *Jansen v. Jansen*, cited in *Rogers v. Pittis*, 1 Add. 38; 1 Williams Exors. 205; In the goods of *Honblon*, 11 Jur. N. S. 549; In the goods of *Whatman*, 33 L. J. P. 17. See also the case of *Lord St. Helens v. Lady Exeter*, 3 Phillim. 461, in note to *Fawcett v. Jones*; and see further, *Thompson v. Hempenstall*, 1 Rob. 783. A codicil will refer to the last in date of several wills if no express date is mentioned; if there is, to that of the particular date expressed: *Crosbie v. MacDoual*, 4 Ves. 615; and the courts of law have determined that evidence cannot be admitted to prove that such reference was a mistake, and that the testator did not mean to refer to the will to which the codicil does expressly refer: *Lord Walpole v. Lord Orford*, 3 Ves. 402; S. C. by the name of *Walpole v. Cholmondeley*, 7 T. R. 138; *Crosbie v. MacDoual*, 4 Ves. 616. The decision has been applied in the Spiritual Courts to a will of personality, since the Stat. 1 Vict. c. 26: In the goods of *Chapman*, 1 Rob. 1. See also *Payne v. Trappes*, 1 Rob. 583; S. C. 5 No. Cas. 147, 478; *Thompson v. Hempenstall*, 1 Rob. 783, 793; S. C. 7 No. Cas. 141, 148; In the goods of *Goodenough*, 2 S. & T. 141. When a

testator refers in a codicil to a last will, and there is nothing in the contents of the codicil to point to any particular will, it must be construed to refer to the will in legal existence as the last will, and not to a revoked will: *Hale v. Tokelore*, 2 Rob. 326, by Dr. Lushington.

(b) By Lord Eldon, C., in *Bowes v. Bowes*, 2 Bos. & Pull. 506. See also *Hopwood v. Hopwood*, 7 H. L. C. 728; 5 Jur. N.S. 897, where it was held that the codicil does not necessarily make the will operate as if it had been originally made at the date of the codicil.

(c) 1 Williams Exors. 206; *Strathmore v. Bowes*, 7 T. R. 482; S. C. under the name of *Bowes v. Bowes*, in Dom. Proc. 2 Bos. & Pull. 500. See also Lord Mansfield's judgment in *Heylin v. Heylin*, Cowp. 132; *Parker v. Biscoe*, 3 J. B. Moo. 24; *Smith v. Dearmer*, 3 Y. & Jerv. 278; *Ashley v. Waugh*, cor. Lord Cottenham, cited in *Doc v. Walker*, 12 M. & W. 598, 601; *Money Penny v. Bristol*, 2 Russ. & M. 117; *Hughes v. Turner*, 3 M. & K. 666; *Doc d. Bidulph v. Hole*, 15 Q. B. 848; 15 Jur. 13; 20 L. J. Q. B. 57; *Hughes v. Hosking*, 11 Moo. P. C. 1.

(d) See 1 Williams Exors. 209, and cases in note (u).

principle that, of any number of wills, the last and newest is that in force, it revokes any will of a date prior to that of republication (a).

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13. But there is a great distinction between wills and codicils in this respect; for as every codicil is, in construction of law, a part of the will, a testator, by expressly referring to and confirming the will, will not be considered as intending to set it up against a codicil or codicils, revoking it in part. And therefore, in a case where a testator made a will, and afterwards executed several codicils thereto, containing partial alterations of, and additions to the will; and by a further codicil, referring to the will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the will; this confirmation of the will was held not to revive the parts of it which were altered or revoked by the former codicils; Lord Alvanley, M. R., observing, that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it (b).

14. In *Upfill v. Marshall* (c), a will (dated February, 1837) disposed of real and personal estate. A codicil (dated June, 1837) partly revoked the disposition of the personalty. A memorandum (dated July, 1838) formally republished the will. And it was held that parol evidence was admissible to show *quo animo* the memorandum

(a) *Serocold v. Hemming*, 2 Cas. temp. Lee, 490; *Rogers v. Pittis*, 1 Add. 38; *Jansen v. Jansen*, Ibid. 39; *Walpole v. Orford*, 3 Ves. 402; *Walpole v. Cholmondeley*, 7 T. R. 138; 1 Williams Exors. 209.

(b) *Crosbie v. MacDougal*, 4 Ves. 610; 1 Powell Dev. 624, Jarman's edition. See *Grand v. Reeve*, 11 Sim. 66; *Bunny v. Bunny*, 3 Beav. 109; *Cartwright v. Shephard*, 17 Beav. 301. Where there are several codicils of different dates, it will

always be a question to be determined from the contents of the codicils, and (at all events in a court of probate) from all other circumstances of the case, whether the latter are cumulative to or substituted for and revocatory of the former: *Methuen v. Methuen*, 1 Phillim. 410; *Greenough v. Martin*, 2 Add. 239. But see *Thorne v. Rooke*, 2 Curt. 799.

(c) 3 Curt. 636.

BOOK V. was made ; and upon that evidence, that the codicil was
 CHAP. I. not revoked by the republication of the will (a).

15. Another consequence of a republished will being considered as a new will of the date of the republication is, that its operation is extended to subjects which have arisen between its date and republication (b). As if one give to Sarah, his wife, a piece of plate, or other thing, and hath no such wife at the time, but after marrieth one of that name, and then publisheth the will again : now this shall be a good bequest (c). So if one devise goods which he hath not, if he after do purchase the same, and then say that his will before made shall stand or be his will, it shall be a good will and bequest ; for this in effect is a new making (d). So where a man had devised a lease to his daughter, and afterwards renewed the lease, which was held to amount to a revocation by ademption of the lease originally bequeathed, it was holden that the renewed lease passed by means of a codicil made after renewal, which, although it took no notice of the lease, operated as a republication of the will (e). And so far has the doctrine that a republication gives words used in the original will the same force and effect as they would have had, if first written at the time of the republication, been extended, that it has been considered that a bequest may extend to any person to whom the description is applicable at the period of republication, though not originally intended (f).

16. As a will of personalty made by a woman before coverture, and revoked by her marriage, might be repub-

(a) 1 Williams Exors. 210. See also *Wade v. Nazer*, 1 Rob. 627 ; S. C. 6 No. Cas. 46.

(b) See *Moore v. White*, 6 Johns. Ch. R. 375.

(c) 1 Went. Off. Ex. c. 1, p. 62, 14th edition.

(d) Ibid.

(e) 1 Williams Exors. 211 ; *Alford v. Earle*, 2 Vern. 208 ; S. C. cited under the name of *Alford v. Alford*, 3 P. W. 168. See also *Coppin v. Fernyhough*, 2 Bro. C. C. 291 ; *Porter v. Smith*, 16 Sim. 251.

(f) *Perkins v. Micklethwaite*, 1 P. W. 275 ; 1 Williams Exors. 211.

lished by her when she became a widow, so as to revive it; so, if an infant having attained the age of fourteen, if male, or twelve, if female, by approval or recognition, or any other means, republishes a will of personalty which he or she made before arriving at those ages, it is thereby made effectual to all intents and purposes (a). And on the same principle a will made by a testator whilst *non compos mentis* may be adopted by him when sane by means of republication (b).

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17. Notwithstanding the wording of the 2nd section of "The Wills Act, 1873," no republication will, after the 31st December, 1873, be effectual, unless by re-execution, according to the solemnities prescribed by the new Act, for an original will; or by a codicil executed in the same manner, notwithstanding the will itself may have been executed before the 1st January, 1874 (c).

18. The question whether the cancellation of a later revoking will has the effect of reviving the former will thus revoked, seems never to have been perfectly settled. The Common Law Courts in England adopted the opinion that the cancellation of the later revived the former will, but the Ecclesiastical Courts adopted and adhered to the contrary doctrine.

19. In *Harwood v. Goodright* (d), Lord Mansfield said, "If a testator makes one will, and does not destroy it, though he makes another at any time, virtually or expressly revoking the former, if he afterwards destroys the revocation, the first will is still in force and good." And Chancellor Kent remarks (e), "If the first will be not actually cancelled or destroyed, or expressly revoked on

(a) 1 Williams Exors. 217; Swinb. Pt. 11, s. 2, pl. 8; *Herbert v. Torball*, 1 Sid. 162.

(b) 1 Williams Exors. 217.

(c) See *Hobbs v. Knight*, 1 Curt.

768, 774; *Ferraris v. Hertford*, 3 Curt. 468, 512; and 1 Williams Exors. 208.

(d) Cowp. 92.

(e) 4 Comm. 531.

BOOK V. making a second, and the second will be afterwards cancelled, the first will is said to be revived." He adds, however, that "such an effect will depend on circumstances."

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20. Mr. Jarman (*a*) states the law upon the subject under discussion very clearly and positively. He says, "Where the posterior of two inconsistent wills is lost (*b*) or is cancelled (*c*), or otherwise revoked by the testator in his lifetime, the effect of such revocation clearly is, according to the old law (which, it will be remembered, still applies to all wills made before the year 1838), to restore the prior will to its original position; and such restored will, if not revoked by any subsequent act of the testator, will come into operation at his decease. This is an inevitable consequence of the ambulatory character of the instrument, which character, of course, pervades its whole contents, extending no less to an express clause of revocation than to every other part (*d*); and hence the distinction sometimes suggested between cancelled wills which do and those which do not contain such clauses, in regard to their revoking effect upon an earlier uncanceled will, is wholly without foundation (*e*). The clause of revocation, like every other clause, is silent until the death of the testator calls the will into operation; and though the Ecclesiastical Courts appear for a long period to have entertained the notion that a cancelled will, with a clause of revocation, revoked a prior uncanceled one (*f*), yet those Courts have of late greatly modified, if not wholly abandoned the doctrine; for, in the case of *Usticke v. Bawden* (*g*), Sir John Nicholl laid it down, that the legal presumption was neither adverse to nor in favour of the

(*a*) 1 Jarm. Wills, 127.

(*b*) *Rainier v. Rainier*, 1 Jur. 754.

(*c*) *Goodright v. Glazier*, 4 Burr. 2512.

(*d*) *Harwood v. Goodright*, Cowp. 92.

(*e*) See Roper on Revocation, 94.

(*f*) Vide cases cited in *Moore v. Moore*, 1 Phillim. 412.

(*g*) 2 Add. 116.

revival of a former uncanceled, upon the cancellation of a later revocatory, will (a). The question was, he said, open to decision either way, according to facts and circumstances, and which in the case then before the Court were thought strongly to favour the revival.

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21. In *Wilson v. Wilson* (b) and *Kirkcudbright v. Kirkcudbright* (c), Sir John Nicholl, who is high authority, considered the point as still unsettled, whether the presumption of law is that on the revocation of a later will, a former uncanceled will is presumed to revive or not. "The presumption," he says, "in the latter case may depend *prima facie* on the nature and contents of the will itself, exclusive of circumstances *dehors* the will. If the latter will contains a disposition quite of a different character, the law may presume such a complete departure from the former intention, that the mere cancellation of the latter instrument may not lead to a revival of the former, but intestacy may be inferred. If, however, the two wills are of the same character, with a mere trifling alteration, it may be presumed that when the testator destroyed the latter, he departed from the alteration, and reverted to the former disposition remaining uncanceled" (d).

22. "The Wills Act, 1873," provides (e) that "no will which shall be in any manner revoked shall be revived" by a codicil, unless it be a codicil duly executed, and *showing an intention to revive the same*. The construction to be put upon these latter words in the English Act was fully considered by Sir J. P. Wilde, in three cases which came before him recently for adjudication (f).

(a) See *James v. Cohen*, 3 Curt. 770; 8 Jur. 249.

(b) 3 Phillim. 554.

(c) 1 Hagg. 326.

(d) See *Welsh v. Phillips*, 1 Moo. P. C. 209.

(e) S. 19.

(f) In the goods of *Steele*; In the goods of *May*; In the goods of *Wilson*, L. R. 1 Prob. 575.

BOOK V. The conclusion at which the Court arrived was, that a will
 CHAP. I. cannot, since the Statute, be revived by mere implication, and that the intention must appear on the face of the codicil, either by express words referring to a will as revoked, and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court, with reasonable certainty, the existence of the intention. Sir J. P. Wilde reviewed the authorities in a judgment which is deserving of careful consideration.

(a) "The broad question," he said, "in these three cases is, whether a will which has been revoked, and another will substituted, has or has not been revived by the operation of a subsequent codicil. This is a question of construction, and one of some difficulty.

(b) "The occurrence of no less than three instances within a short period in which this question has arisen, makes it desirable to pass in review some of the decisions by which the judgment of the Court ought to be guided. The following appear to be the propositions established by previous authority:—Unless there be a latent ambiguity in the codicil, evidence of the testator's real meaning must be excluded. This is in obedience to the well-known common law doctrine with respect to written instruments, as was decided in *Walpole v. Cholmondeley* (a), which was acted upon in the goods of *Chapman* (b). It may be proper on some future occasion to consider the doctrine upheld in Courts of Equity, where mistakes, if proved to demonstration to be so, have been rectified even in written documents. This subject is well discussed in Story's Equity Jurisprudence, 156, 157.

(a) 7 T. R. 138.

(b) 1 Rob. 1.

(c) "The next proposition is this: That, although evidence of the testator's intention is excluded, the Court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words he has used. This is a doctrine constantly acted upon at common law in relation to written documents, and notably in cases of written guarantee. It is affirmed in the fifth proposition of Sir James Wigram's excellent book on the subject.

(d) "Thirdly, it has been decided by no less than three very remarkable cases that if the codicil refer to a will with the intention of reviving it, and it turn out that such will had been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival.

(e) "The circumstances of these three cases of course varied, but in all three there were two wills, the latter one revoking the former, and a subsequent codicil referring by date to the former will. They all had this further feature, that the first will was not only revoked, but destroyed. The earliest was the case of *Hale v. Toke-love* (a), decided by Dr. Lushington in 1850. He held, that the codicil would not in law revive the first will, because the will 'was gone, destroyed *animo revocandi*,' but that the second will 'was revoked by necessary implication because a prior will was confirmed.' The only paper entitled to probate he held to be the codicil. The next was the case of *Newton v. Newton* (b), determined in Ireland by Mr. Justice Keating in 1860. He held, like Dr. Lushington, that the codicil could not revive the first will, but that the second will was entitled to probate, as the intention to revoke the second was dependent upon the

(a) 2 Rob. 318.

(b) 5 L. T. N. S. 218.

BOOK V. establishment of the first. His decision on this last head
 CHAP. I. was reversed by the Court of Appeal in 1861 (a), and the
 testator declared to have died intestate. The last case
 was that of *Rogers v. Goodenough* (b), decided by Sir
 Cresswell Cresswell in 1862. He held, as in other cases,
 that the codicil could not revive a will that had no existence,
 but that, there being no words in the codicil expressing
 the intention to revoke the second will, and no dispositions
 of property inconsistent with that will, there was no ground
 for affirming that, in any of the modes pointed out by the
 statute, a revocation of the second will had been effected;
 and he granted probate of the second will and the codicil as
 together containing the will of the deceased. This last case,
 it will be observed, is an authority for this further proposition,
 that a codicil which refers by date, and which the testator
 intended as a codicil to one will, may be entitled to probate
 with another will.

(f) "Assuming, then, upon these authorities, that a codicil
 may, by referring in adequate terms to a revoked will, revive
 that will if it be in existence, and that in ascertaining whether
 the testator intended such revival, the Court is precluded, unless
 there is a latent ambiguity in the codicil, from receiving any
 evidence except what may suffice to place it in the position of
 the testator, the next question will be, what is the effect of the
 statute?"

(g) "The words of the section (c) are as follows:—'No will
 which shall be in any manner revoked shall be revived' by a
 codicil, unless it be a codicil duly executed, and 'showing an
 intention to revive the same.' What is the meaning of these
 last words? To appreciate them it is necessary to bear in
 mind the law as it stood when they were enacted. The theory
 of the law is, and always

(a) 12 Ir. Ch. Rep. p. 118.

(b) 2 S. & T. 342; 31 L.J.P. 49.

(c) 1 Vict. c. 26, s. 22.

was, that a codicil forms part of a will, and, consequently, that to make a codicil to your will is first to affirm the existence of that will ; and, secondly, to republish it or reaffirm its validity. It was, therefore, before the Act, an inference which the law drew from the making of a codicil, that the testator intended to reaffirm his will, and, if the will had been revoked, by reaffirming it to revive it. In brief, it would not be wrong to say that all codicils to wills were held before the Act passed to revive the wills to which they were respectively codicils, if such wills had been previously revoked. As soon, therefore, as it could be ascertained that the codicil in question was a codicil to a particular revoked will, that will was revived. The difficulty with which the Courts in the contested cases had to grapple, was to ascertain to which or what will the disputed paper was intended as a codicil.

(h) "Such being the state of the law before the Act, I hesitate to accept the conclusion, that the express words of the section meant to leave the matter in the same state in which it would have stood if they had never been introduced. If the merely declaring that a particular paper was to be taken as a codicil to a particular will was all that the Legislature required when it enacted that the codicil should 'show an intention to revive' a revoked will, the words 'showing an intention to revive the same' were quite needless, for every codicil to a revoked will, by force of being a codicil to such will, so showed it. I, therefore, infer that the Legislature meant that the intention of which it speaks should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the

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existence of the intention in question. In other words, I conceive that it was designed by the statute to do away with the revival of wills by mere implication. It is proper here to take note of the case of *Payne v. Trappes* (a). In that case there would seem to have been but little beyond the reference by date to show the intention to revive a former will. But the Court did not lay down the proposition that the date alone was sufficient; on the contrary, the learned Judge said he must 'gather the intention from the codicil itself;' 'that the intention to revive the former will was clearly shown;' and 'that the testator had taken great pains to describe the instrument to which the paper was intended as a codicil.' The decision proceeded upon the grounds that the Judge was convinced of the testator's intention, not that he felt bound by the language in the face of an opposite conviction. On the other hand, I am much fortified in the view I take of the meaning of the statute by the remarks of Sir C. Cresswell in the case of *Marsh v. Marsh* (b). I allude to his statement that the words 'last will' and '*prima facie*' refer to the real last will, and particularly to the opinion he there expressed, that 'it appears to have been the object of the Legislature to put an end equally to implied revocations and implied revivals.'

(i) "The due result of the documents in each case, and of such external facts as may be admitted in evidence, must of course be gathered from the language of the documents themselves read in the light of such facts. Some general views, however, present themselves—some general probabilities of intention attend all such cases as those now under judgment. It may in the outset, I think, be doubted whether any testator who bore in mind that

(a) 1 Rob. 583.

(b) 1 S. & T. at p. 533; 30 L.J.P. 77.

he had revoked his will, and substituted another for it, ever really sat down with the purpose of revoking his last will and reviving the former one, and set about the execution of that purpose by simply making a codicil referring by date to his first will, without more. Would any lawyer advise such a course, or would any unskilled testator imagine he could achieve the end by such a method? The leading idea of revoking the one and reviving the other in its place would surely find expression by some form of words in a paper designed mainly for that object. On the other hand, I conceive that, in the vast majority of cases, when a man declares his intention that a particular paper, varying his previous dispositions, should be taken as a codicil to 'his last will and testament,' he means that which really is his last will and testament, his then *existing* will, and the dispositions of his property then in force. In like manner, when he goes on to declare, in the common language of codicils, that 'in all other respects he ratifies and confirms his last will and testament,' he really means to confirm that which exists, and not to bring to life a paper which has ceased to be testamentary or revive dispositions which have no existence, and are therefore not, properly speaking, capable of being ratified.

(j) "That these conclusions are just in the main is amply proved by the fact that, whenever full light has been cast on the testator's real purpose by means of parol evidence, the reference to the earlier will has in most cases turned out to be nothing but a blunder. If experience had not shown the fact, it would be almost incredible that mistakes should occur so constantly as they do in so simple a matter as reciting the true date of the will. And yet in many cases errors of this kind, if allowed to be proved, can not only be proved, but proved to demonstration. The ex-

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cluded evidence in the celebrated case of *Walpole v. Cholmondeley* (a) proved the error that had been committed and the cause of it, on testimony so clear and so free from suspicion as to remove the last trace of reasonable doubt. Sometimes the error arises from the attorney or a clerk who has laid his hand on the wrong paper; sometimes from the testator, who has kept his first will in his own possession and forgotten his second, which he has left in the hands of his attorney; oftentimes from the employment of an attorney to draw the codicil, who has made an earlier will, and has been in ignorance that an intermediate will has been made. I am, therefore, of opinion that the Court ought to be slow to conclude that a testator has manifested in this indirect way a desire to revoke his last will, and that it should scrutinize narrowly the language of a codicil which is said to show such an intention, lest in the desire to follow the testator's wishes too blindly it should set them at nought altogether (b)."

(a) 7 T. R. 138.

(b) The report continues as follows:

"IN THE GOODS OF STEELE.—I proceed to the facts of the present case. The testator made a will on the 16th of January, 1866. On the 25th of October, 1866, he made a fresh will, revoking the former. On the 12th of January, 1868, he made a codicil, which was declared to be a codicil 'to his last will and testament, which will bears date the 16th day of January last past;' in other words, the 16th of January, 1867. At the conclusion of the codicil he confirms his said last will. Here is a latent ambiguity, and the Court may resort, if need be, to the affidavits filed. But I am of opinion that on the face of the documents themselves there is no intention shown with anything like sufficient distinctness to revoke the testator's last will, and revive the former one. It is true that the codicil speaks of the last will as containing a legacy to his nephew of a hundred pounds, and that this legacy is to be found

in the will of 1866, whereas in the last will the legacy is reduced to fifty pounds. But that the memory of the testator, an old man past eighty, was at fault, is clear by his widely incorrect reference to the date of his last will; and I see no reason why it should not have failed him in describing the amount of the legacy which he wished to revoke, though he bore in mind the object of his bounty. On the other hand, the will he speaks of is his 'last will;' and then no trace of a desire to depart from it is to be found on the face of the codicil. I think, therefore, that the will of October, 1866, was never revoked, and that it is entitled to probate, together with the codicil in question.

"IN THE GOODS OF MAY.—The testator made a will on the 11th of January, 1860. On the 18th of August, 1860, he married. On the same 18th of August, after his marriage, he made a fresh will, and in terms revoked his former one. In the month of Sep-

It has been held that the revival of a will by a did not necessarily involve the revival of a prior to that will; and that an intention to revive such odicil, distinct from the intention to revive the will, e shown (a). The intention of a codicil to revive cannot be established by an act of the testator the instrument (b). There can be no revival of a hich has ceased to have both a physical and legal ce (c).

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in the same year, he took ble to cancel his first will g off the signature. On the ly, 1861, he made a codicil, described as 'a codicil to will and testament of me, y, of, &c., and which will e the 11th day of January, f parol evidence is admis- is plain that this reference rlier will was nothing but a on the part of the attorney r it; but I do not think it ry to decide whether it was ; for I am unable to per- sufficient evidence on the e codicil itself that the tes- tained an intention to s former will. His marriage i revoked it. He had im- r after his marriage sub- another for it in almost the itical terms, and to prevent es he had taken the trouble f the signature. It is plain September, 1860, when he d, he considered the will of o be the effective record of nentary dispositions; and once no motive which nder it probable or hardly that he should desire to e will of January. In a s codicil read by the sur- circumstances of the case ow the necessary intention. rt grants probate of the ugust, together with the July, 1861, and a further the 6th of September, 1865, sh no question was made. n Goods of WILSON.—In he testator made his will on

the 24th of September, 1858. On the 16th of July, 1861, he made a fresh will, disposing of the whole of his property. The first will was found after his death with the signature torn off, and had been used by him as a draft for the second will. On the 20th of December, 1864, he made a codicil, which he declares to be a codicil to 'his last will and testa- ment, dated the 24th of September, 1858.' Notwithstanding this per- fectly distinct reference to the date of his earlier will, it is plain to demonstration, from the contents of the codicil itself, that he was really referring to the will of 1861. He speaks of bequests which are to be found only there, and goes on to say that he has altered those bequests in his own hand on the face of 'his said will,' and for greater certainty has numbered the lines in which these alterations are to be found. These alterations, with numbers to the lines, are found in the will of 1861, and the Court has no hesitation in affirming that it was to that will he intended the codicil to apply. The Court grants probate of the will of 1861, with the codicil of 1864."

(a) In the goods of *Reynolds*, L. R. 3 Prob. 35.

(b) *Marsh v. Marsh*, 1 S. & T. 528; 6 Jur. N. S. 380; 5 L. T. N. S. 719.

(c) *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J. P. 49; 8 Jur. N. S. 391; 5 L. T. N. S. 719. For cases in which the Court has held the revival sufficient, see In the goods of *Terrible*, 1 S. & T. 140; In the goods of *Lewis*, 7 Jur. N. S. 220.



CHAPTER II (a).

SUGGESTIONS TO THOSE EMPLOYED IN DRAWING WILLS.

1. The time of making wills, too often deferred till the testator is incompetent.
- n. (a) Care should be exercised, not to assist in making a will, which is not the act of disposing mind and memory.
2. Great care should be taken, that testators effect what they desire or intend.
3. Testators often dependent, to a great extent, upon legal advice as to the form of their wills.
4. Care is often requisite to translate the testator's language accurately.
5. Counsel should be careful to understand testators, and be understood by them.
6. Mr. Jarman's hints as to description of estates, intermediate profits, and charge for debts.
7. In relation to securing property to wife and children.
 - n. (a) It is always safe to advise testators against embarrassing the transmission of the title to estates.

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CHAP. II.

1. IT not unfrequently happens, that the most important act of a man's life, so far as mere property interests are concerned, is left to the very moment of death; or so near that fatal crisis that no time or capacity for reflection or deliberation, either of the testator or his legal adviser, or next to none, remains. In regard to that considerably numerous class of cases, and one which we fear is not sensibly diminishing, we could give no advice which would be likely to prove of much advantage. All that then remains to be done, is, to make the best improvement of the short period of time remaining, always remembering to do nothing against one's clear convictions of

(a) This chapter and the forms of wills in the Appendix are re- printed with some slight alterations from Redfield's work on Wills.

right (a). By this we mean, never, out of tenderness towards the testator or the family, or from motives of delicacy or reserve, to become participators in a transaction which, in its most favourable aspect, is merely colourable.

2. But where the testator gives his instructions while in sound health, both of body and mind, and there seems no adequate motive either for haste or reserve, great care should be taken that the testator comprehends the full force of his acts. This may seem an unimportant suggestion, since it is generally supposed that most of the

(a) We have ventured here to make a brief suggestion upon this not unimportant topic, because we have perceived a very marked contrast between the reserve practised among English solicitors and legal advisers, in regard to assisting at the formal act of the execution of a will, by one evidently *in articulo mortis*; and the forwardness which is more commonly found among all classes, about the death-bed of any person in this country. We have thought this difference the result of wrong views on the part of the people of this country. We have no question it results from over-tenderness often. It seems to be supposed by many, that aiding a man in performing the formal act of executing his will, is only one of those offices of the death-bed which it would imply want of delicacy to withhold. And it is, therefore, often done, by the most upright and conscientious persons, without the remotest suspicion that there is the slightest hazard of thereby wronging any other person. But a moment's reflection will convince all that this is not sure to be the fact.

A man is always supposed to desire to execute his will; and those about his death-bed who desire him to do so, generally urge him to execute it; because it will give the property of the testator a different direction from what it might otherwise have. The attempt, therefore, to execute a will for a dying man, or for any one in a state of mind where he is evidently not fully the master of his own acts, is an attempt to use the broken capacity of the testator, such

as it is, for the purpose of diverting his property from those natural and ordinary channels, in which the wisdom of the law of the state has determined that it ought to flow; unless the owner, in a state of sound, disposing mind and memory, should otherwise determine. Any assistance, or countenance, therefore, which one consents to give on such an occasion, when reasonably convinced that the testator is not in the proper state to perform such an act, is so far consenting to aid in the accomplishment of an unlawful purpose.

When, therefore, one consents to become a witness to the execution of a will, and goes into court and testifies that he did not regard the testator, at the time of his attestation of the execution, as being in a state of mind suitable to the full comprehension and understanding of his act, he virtually declares his own infamy. But this is done, every day almost, in the American courts, without the remotest suspicion that there is any want of fair dealing in the transaction. We have alluded to the subject more than once, in this work, because we would be glad to correct what we regard as a vicious practice. It was decided, in *Hampton v. Garland*, 2 Hayw. 147, that the attesting witness to a will may be offered to prove want of sanity in the testator at the time of its execution, and there is no doubt of the correctness of the decision. But they might almost as well have testified the instrument was a forgery, so far as their own credit was concerned.

BOOK V. transactions connected with the making of a will are simple, and not susceptible of much uncertainty in their results. But this will be found to be, in general, a misapprehension; since it is the constant experience of those most employed in litigation, resulting from the settlement of estates, how very much disappointment of the testator's expectations generally supervenes, in spite of all efforts of courts to the contrary. This is a remark constantly made by the English equity judges.

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3. It is very justly said by Mr. Jarman, in his excellent suggestions upon this subject, that many men, when they sit down to the earnest work of making their wills, have such imperfect views of the mode of framing the instrument which they propose, that they are wholly dependent upon the counsel of their legal advisers. It becomes, under such circumstances, a very important office to give proper advice, and, above all, to assure one's self that the form adopted is not only suitable and proper for the end proposed, but that it fully and precisely expresses the purpose of the testator.

4. There is another category, of not unfrequent occurrence in preparing testamentary papers. The testator, from want of acquaintance with the proper mode of expressing his intentions, and from long study and reflection upon the subject, may have fallen into an involved and complicated mode of stating a very simple thing. If, then, the draughtsman, as is very common, falls into the mere routine plan of writing, as nearly as practicable, the very words of the testator, without any effort to get at his real purpose, the result will generally be that the instrument itself will be dark, confused and incomprehensible. Whereas, on the contrary, a slight effort of the draughtsman would have enabled him to learn, with precision, the exact purpose of the testator, and using his own

language, without a too strict copying of the words of the testator, might have saved litigation, or secured important rights, which failed for want of such circumspection on his part.

BOOK V.
CHAP. II.

5. Two leading points are essential in this matter of framing wills for others: 1. That the legal adviser fully possess himself of the real purposes of the testator. 2. That he become reasonably certain, before he allow the instrument to pass to its final authentication, that the language which he adopts in expressing what he believes to be the intention of the testator, is perfectly comprehended by him. And to secure this end, it becomes of cardinal consequence, that he should adopt the plainest and least involved mode of composing the instrument; and also, that he avoid the use of unusual technical expressions as far as practicable; and that where this does not seem practicable, he should clearly explain the force and effect of such language, not only in regard to probable and naturally expected contingencies, but also in regard to such as are less likely, but possible, to intervene; so that the testator may surely comprehend and fully understand the import of the language put into his mouth upon so solemn an occasion, which, from a somewhat extended experience in the trial of testamentary causes, we feel sure is not always the case.

6. Mr. Jarman mentions the following considerations:

(1.) That in the devise of real estate, care be taken to secure accurate description; and that where the same estate is described by boundaries, and the name of the occupant, especial watchfulness be exercised that both precisely concur, since more controversy arises out of such discrepancies than from any other one source.

(2.) That where an estate is devised to a class, not certain to be in existence at the decease of the testator, as to

BOOK V. the children of A., who may have none at that time, provision be made for the disposition of the intermediate profits of the estate.

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(3.) That where any particular funds are set apart for payment of debts, it should be clearly defined, whether it is the intention of the testator thereby to exonerate the general personalty from being primarily liable to that charge. He also names the case of mortgaged estates already alluded to.

7. So also in relation to the objects of the testator's bounty, some degree of circumspection may be requisite (a). In securing an estate to the wife and children of the

(a) The purposes and wishes of testators are so various in regard to making provision for one's family, that nothing approaching certainty could be suggested in any general view of the subject. But in this country, where anything approximating permanency of investment must be regarded as the exception, rather than the rule, it has always seemed to us, that everything of the character of complicated or restrictive provisions, in regard to the alienation of estates, was more liable to lessen the value of the estate to the devisee, than to secure an equivalent advantage by means of its longer enjoyment. There should, therefore, as a general thing, be lodged somewhere, a discretionary power of alienation, when the interest of the devisee imperiously demands it. There is a strong proclivity in the human mind to fasten the most unlimited restrictions upon property bequeathed. But all such things, in this country certainly, savour more of the vanity and conceit of the testator, or of his want of trust in the upholding care and protection of an overruling Providence, than either of wisdom or prudence.

But, after all, it is not to be expected that mere legal advisers can exercise much control over the character of testamentary dispositions; and many might think it undesirable that it should be so. We have, nevertheless, experienced, in many instances, the very great benefit of wise

and judicious counsels upon such subjects. And we make no question, that if more freedom were felt and exercised upon such subjects, it would be found useful.

The following are Mr. Jarman's concluding suggestions upon this subject:

1. "The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are, at what ages their shares are to vest; whether the income or any portion of it is to be applied for maintenance until the period of vesting, and if not *all* applied, what is to become of the excess? Whether, if any child die in the testator's lifetime, or subsequently, before the vesting age, leaving children, such children are to be substituted for the deceased parents. If the vesting of the shares be postponed to the death of a prior tenant for life, or other possibly remote period, the necessity for providing for such events is of course more urgent; and in that case it should also be ascertained whether, if the objects die leaving grandchildren, or more remote issue, but no children, such issue are to stand in the place of their parent.

2. "If any of the objects of the gift (whether of real or personal property) be females, or the gift be made capable of comprehending them, as in the case of a general devise, or bequest, to children, it should be

testator, it will often be of essential advantage to suggest the more common modes of effecting the purpose; as by vesting the whole estate in the wife during life; and with the power of appointing the same to the children, in

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CHAP. II.

suggested, whether their shares are not to be placed out of the power of husbands, *i.e.* limited to trustees for their separate use for life, subject or not to a restriction on alienation (which, however, is a necessary concomitant to give full effect to the intention of excluding marital influence), with a power of disposition over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of retraction, it should be confined to dispositions *by will*, which, being ambulatory during her life, can never be exercised so as to fetter her power of alienation over the property.

3. "If the devise be of the legal estate of lands of inheritance to a man, it should be inquired (though the affirmative may be presumed in the absence of instructions) whether they are to be limited to uses to bar the dower of any wife to whom he was married on or before the 1st of January, 1834.

4. "If a gift be made to a plurality of persons, it should be inquired whether they are to take as joint tenants, or tenants in common; or, in other words, whether with or without survivorship; though it is better, in general, when survivorship is intended, to make the devisees tenants in common, with an *express* limitation to the survivors, than to create a joint tenancy, which may be severed.

5. "In all cases of limitations to survivors, it should be most clearly and explicitly stated to *what period survivorship is to be referred*; that is, whether the property is to go to the persons who are survivors at the death of the testator, or at the period of distribution. It should always be anxiously ascertained that the testator, in disposing of the shares of dying devisees, or legatees, among surviving or other objects, does not overlook the possible event of their leaving children or other issue. There

can be little doubt, that in many cases of absolute gifts to survivors, this contingency is lost sight of. This observation, in regard to the unintentional exclusion of issue, applies to all gifts in which it is made a necessary qualification of the objects, that they should be living at a prescribed period posterior to the testator's decease, and in respect of whom, therefore, the same caution may be suggested.

6. "It may be observed, that where interests not in possession are created which are intended to be contingent until a given event or period, this should be explicitly stated; as a contrary construction is generally the result of an absence of expression. Explicitness, generally, on the subject of vesting, cannot be too strongly urged on the attention of the framers of wills.

7. "Where a testator proposes to recommend any person to the favourable regard of another, whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee, or legatee, in favour of such person, or to express a wish without conferring a right. In the former case a clear and definite trust should be created; and in the latter, words negating such a construction of the testator's expressions should be used. Equivocal language, in these cases, has given rise to much litigation.

Lastly. "It may be suggested, that where a testator is married, and has no children, unless provision be made in his will for children coming *in esse*, or it be unreasonable to contemplate his having issue, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, that may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition of their

BOOK V. such proportions as she may deem most just and useful;
 CHAP. II. or by providing that the children shall share equally in the remainder, after her decease; but no child shall have any share until after majority, or marriage.

property at the birth of children; indeed, it has sometimes happened that a testator has left a child en ventre sa mere, without being conscious of the fact; for the same reason, provisions for the children of a married testator, who has children, should never be confined to children *in case* at the making of the will. A gift to the testator's children, generally, will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life-interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

"To the preceding suggestions it

may not be useless to add, that it is in general desirable that professional gentlemen, taking instructions for wills, should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons are interested. In a case in the Prerogative Court, *Rogers v Pittis*, 1 Add. 46, Sir J. Nicholl 'admonished professional gentlemen generally, that where instructions for a will are given by a party not being the proposed testator, *a fortiori*, where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity; or, in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all."

APPENDIX I.

“THE WILLS ACT, 1873,”

(36 Vict. Cap. 20.)

AN ACT TO CONSOLIDATE AND AMEND THE LAW AS TO WILLS.

[Assented to 29th March, 1873.]

WHEREAS it is expedient to consolidate and amend the **APPENDIX I.**
law as to Wills ;

Therefore Her Majesty, by and with the advice and consent
of the Legislative Assembly of the Province of Ontario, enacts
as follows :—

1. This Act may be cited as “The Wills Act, 1873.” Short title.
2. Unless herein otherwise expressly provided, this Act shall Commence-
ment of opera-
tion of the Act.
not extend to any will made before the first day of January,
one thousand eight hundred and seventy-four, but every will
re-executed or re-published, or revived by any codicil, shall,
for the purposes of this Act, be deemed to have been made at
the time at which the same shall be so re-executed, re-published,
or revived.
3. Nothing contained in the thirty-eighth and seven follow- Sa. 38 to 45 not
to apply to
cases pending
or decided.
ing sections of this Act shall apply to or affect any case at the
time of the passing of this Act pending or heretofore adjudi-
cated upon and decided by any Court in Ontario.
4. In this Act, the term “will” shall extend to a testament, Interpretation
clause.
Imp. 1 V., c.
26, s. 1.
and to a codicil, and to an appointment by will, or by writing
in the nature of a will in exercise of a power, and also to a
disposition by will and testament, or devise of the custody and
tuition of any child, by virtue of an Act passed in the twelfth
year of the reign of King Charles the Second, intituled “An
Act for taking away the Court of Wards, and liveries and
“Will”

tenures *in capite*, and by knights' service and purveyance, and for settling a revenue upon His Majesty in lieu thereof," and to any other testamentary disposition ;

"Real estate." The term "real estate" shall extend to messuages, lands, rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein ;

"Personal estate." The term "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever, which by law devolves upon the executor or administrator, and to any share or interest therein ;

"Person." The term "person" and also the term "testator" shall include a married woman ;

"Mortgage." The term "mortgage" shall include any lien for unpaid purchase money, and any charge, encumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate.

Imp. 30 and 31
V., c. 69, s. 2.

Power to dis-
pose of all
property :

Imp. 1 V., c.
26, s. 3.

Pur autre vie.

Contingent
interests.

Rights of
entry.

Property ac-
quired after
the will.

5. Every person may devise, bequeath, or dispose of by will, executed in manner hereinafter mentioned, all real estate and personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heir at law, or upon his executor or administrator ; and the power hereby given shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament ; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he may be entitled thereto under the instrument by which the same were respectively created, or under any disposition thereof by deed or will ; and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Wills by in-
fants invalid.
Imp. 1 V., c.
26, s. 7.

6. No will made by any person under the age of twenty-one years shall be valid.

7. No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary; Provided always, that every will, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, shall be deemed to be valid, within the meaning of this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the proviso; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

Execution.
Imp. 1 V., c.
26, s. 9.

Attestation.

Signature.
Imp. 15 and 16
V., c. 24, s. 1.

8. No appointment made by will, in exercise of any power, shall be valid, unless the same shall be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power

Appointments,
how to be
exercised.
1 Vic., c. 26,
s. 10.

should be executed with some additional or other form of execution or solemnity.

Wills of personalty of soldiers and sailors.
Imp. 1 V., c. 26, s. 11.

9. Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

Publication unnecessary.
Imp. 1 V., c. 26, s. 13.

10. Every will executed in manner hereinbefore required, shall be valid without any other publication thereof.

Will not invalid if witness interested.
Imp. 1 V., c. 26, s. 14.

11. If any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts, &c., to witness invalid.
Imp. 1 V., c. 26, s. 15.

12. If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or of the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Creditors competent witnesses.
Imp. 1 V., c. 26, s. 16.

13. In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor or the wife or husband of any creditor whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor competent witness.
Imp. 1 V., c. 26, s. 17.

14. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Revocation by marriage.
Imp. 1 V., c. 26, s. 18;
32 V., c. 8, s. 3,

15. Every will shall be revoked by the marriage of the testator, except a will made in the exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's

heir, executor or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions.

and 36 V., c. 15, s. 3 (Ont.)

16. No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances.

No revocation by change in circumstances. Imp. 1 V., c. 26, s. 19, and 32 V., c. 8, s. 4 (Ont.)

17. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

How only will can be revoked. Imp. 1 V., c. 26, s. 20, and 32 V., c. 8, s. 5 (Ont.)

18. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.

Obliterations, Interlineations, &c. Imp. 1 V., c. 26, s. 21.

19. No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Revival. Imp. 1 V., c. 26, s. 22.

20. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death.

No act as to property named in the will to prevent operation of the will as to any interest left in testator. Imp. 1 V., c. 26, s. 23, and 32 V., c. 8, s. 2 (Ont.)

21. Every will shall be construed, with reference to the real

Will to speak
from death.
Imp. 1 V., c.
26, s. 24,
and 32 V., c.
8, s. 1 (Ont.)

Lapsed devise
to sink into
residuary
devise.
Imp. 1 V., c.
26, s. 25.

and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

22. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

Leaseholds,
when may pass
under a general
devise.
Imp. 1 V., c.
26, s. 26.

23. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates of the testator or his leasehold estate or any of them to which such description shall extend (as the case may be), as well as freehold estates, unless a contrary intention shall appear by the will.

General gift to
include realty
and personalty
over which
testator has
power to
appoint.
Imp. 1 V., c.
26, s. 27.

24. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

General devise
to pass whole
estate in the
land devised.
Imp. 1 V., c.
26, s. 28.
Con. Stat., c.
82, s. 12.

25. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a contrary intention shall appear by the will.

26. In any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail or of a preceding gift, being without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Import of words "die without issue," or to that effect.
Imp. 1 V., c. 26, s. 29.

Proviso.

27. Where any real estate shall be devised to a trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate, or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

When devise to trustee or executor shall pass whole estate of testator.
Imp. 1 V., c. 26, s. 30.

28. Where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

When devise to a trustee shall pass the whole estate beyond what is requisite for the trust.
Imp. 1 V., c. 26, s. 31.

29. Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

When devise of estates tail shall not lapse.
Imp. 1 V., c. 26, s. 32.

30. Where any person being a child or other issue of the

Gifts to issue

wholeaveissue
on testator's
death, shall
not lapse.
Imp. 1 V., c.
26, s. 33.

testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any of the issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Mortgage
debts to be
primarily
chargeable on
the lands.
Imp. 17 and 18
V., c. 113, and
29 V., c. 28, s.
33 (Ont.)

31. When any person shall, after the passing of this Act, die seized of or entitled to any estate or interest in any real estate, which shall, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such real estate shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such real estate to obtain full payment or satisfaction of his mortgage debts, either out of the personal estate of the person so dying as aforesaid, or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document made before the passing of this Act.

Proviso.

Consequence
of direction
that testator's
debts be paid
out of per-
sonalty.
Imp. 30 and 31
V., c. 69, s. 1,
and 35 V., c.
15, s. 1 (Ont.)

32. In the construction of any will or deed or other document to which the next preceding section of this Act relates, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said section, unless such contrary or other intention shall be further declared by words expressly, or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

Devisee in
trust may raise
money by sale
or age to

33. Where by any will which shall come into operation after the passing of this Act the testator shall have charged his real estate, or any specific portion thereof, with the payment of

his debts or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract of the said real estate or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

satisfy charges notwithstanding want of express power in the will.
Imp. 22 and 23 V., c. 35, s. 14, and 29 V., c. 28, s. 13 (Can.)

34. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will or by the Court of Chancery to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

Power given by last section extended to survivors, devisees, &c.
Imp. 22 and 23 V., c. 35, s. 15, and 29 V., c. 28, s. 16 (Can.)

35. If any testator who shall have created such a charge as is described in the thirty-third section shall not have devised the real estate charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in the will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said real estate; and such powers shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

Executor to have power of raising money where there is no sufficient devise.
Imp. 22 and 23 V., c. 35, s. 16, and 29 V., c. 28, s. 15 (Can.)

36. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections thirty-three, thirty-four and thirty-five of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Purchasers, &c., not bound to inquire as to exercise of powers.
Imp. 22 and 23 V., c. 35, s. 17, and 29 V., c. 28, s. 16 (Can.)

37. The provisions contained in sections thirty-three, thirty-four, thirty-five and thirty-six shall not in any way prejudice Sections 33,

Sections 33,

34,35,36, not to affect certain sales nor to extend to devisees in fee or in tail. Imp. 22 and 23 V., c. 35, s. 18, and 29 V., c. 28, s. 17 (Can.)

or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the passing of this Act; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not been passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

Powers of sale, &c., may be exercised by executor, when none other named to exercise.

38. Whenever, after the passing of this Act, there shall be in any will or codicil of any deceased person, whether such will be made, or such person shall have died or shall die before or after the passing of this Act, any direction, whether express or implied, to sell, dispose of, appoint, mortgage, encumber, or lease any real estate, and no person shall be by the said will, or some codicil thereto, or otherwise by the testator appointed to execute and carry the same into effect, the executor or executors (if any) named in such will or codicil shall and may execute and carry into effect every such direction to sell, dispose of, appoint, encumber, or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect, as if the executor or executors of the testator were appointed by the testator to execute and carry the same into effect.

Applicant for administration with the will annexed to depose to value of the realty. 33 V., c. 18, s. 1 (Ont.)

39. In every case where any person applies to be appointed an administrator with the will annexed, he shall in his application state, and in his affidavit of the value of the property devolving shall depose to the value or probable value of all the real estate over which, or over any estate in which, the executor or executors named in the will or codicil were by the said will or codicil clothed with any power of disposition, or which real estate, in case of no executor being appointed, was by the will or codicil directed to be disposed of, without any person being appointed to effect such disposition; and in every such case the bond to be given by such person upon his obtaining a grant of administration with the said will annexed, shall, as respects the amount of the penalty of the bond, and the justification of the sureties, include the amount of the value or probable value so stated and deposed to; and the condition of the bond, in addition to the other provisions thereof, shall provide that the administrator shall well and truly pay over and account for to the person or persons entitled to the same, all moneys and assets to be received by him for or in consequence of the exercise by him of any power over real estate created by the will or codicil, and which may be exercised by him.

Condition of the bond, and justification of sureties.

40. Whenever, after the passing of this Act, there shall be in any will or codicil thereto of any deceased person, whether such will be made or such person shall have died before or after the passing of this Act, any power to any executor or executors in such will to sell, dispose of, appoint, mortgage, encumber, or lease any real estate, or any estate or interest therein, whether such power be express, or arise by implication, and whenever, from any cause, letters of administration, with such will annexed, shall have been by a court of competent jurisdiction in Ontario committed to any person, and such person has given, or shall hereafter give, the additional security in the next preceding section mentioned (which additional security the Judge of the Surrogate Court is authorized to receive), such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, encumber, or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect for all purposes as the said executor or executors might have done.

Administrator with will annexed may execute powers of sale, etc.
33 V., c. 18, s. 2 (Ont.)

41. Whenever, after the passing of this Act, there shall be in any will or codicil thereto of any deceased person, whether such will be made or such person shall have died before or after the passing of this Act, any power to sell, dispose of, appoint, mortgage, encumber or lease any real estate, or any estate or interest therein, whether such power be express, or arise by implication, and no person shall be by the said will, or some codicil thereto, or otherwise by the testator appointed to execute such power, and letters of administration with such will annexed, shall have been by a court of competent jurisdiction in Ontario committed to any person, and such person has given or shall hereafter give the additional security before mentioned (which additional security the Judge of the Surrogate Court is authorized to receive), such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, encumber, or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect, as if such last named person were appointed by the testator to execute such power.

Administrator with will annexed may execute powers of sale, etc., where the will names none to execute.
33 V., c. 18, s. 3 (Ont.)

42. Whenever any person shall have entered into a contract in writing for the sale and conveyance of real estate, or of any estate or interest therein, and such person shall have died intestate, or without providing by will for the conveyance of such real estate, or estate or interest therein, to the person entitled or to become entitled to such conveyance under such contract, then, whenever, upon the supposition of the deceased being alive, he would be liable to execute a conveyance, the executor,

When executor or administrator may convey in pursuance of contract of deceased.
33 V., c. 18, s. 4 (Ont.)

administrator, or administrator with the will annexed (as the case may be), of such deceased person, may and shall make and give to the person entitled to the same a good and sufficient conveyance or conveyances for such estates, and of such nature as the said deceased, if living, would be liable to give, but without covenants, except as against the acts of the grantor; which conveyances shall be as valid and effectual as if the said deceased were alive at the time of the making thereof, and had executed the same, but shall not have any further validity.

Duties and liabilities of an executor and administrator acting under the powers in this Act.
33 V., c. 18,
s. 5 (Ont.)

43. Every executor, administrator, and administrator with the will annexed, shall, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of such powers, be subject to all the liabilities, and compellable to discharge all the duties of whatsoever kind, which, as respects the acts to be done by him under such powers, would have been imposed upon an executor or other person appointed by the testator to execute the same, or in case of there being no such executor or person, would have been imposed by law upon any person appointed by law, or by any court or judge of competent jurisdiction, to execute such powers.

Powers given by this Act to two or more to survive.
33 V., c. 18,
s. 6 (Ont.)

44. Where there are several executors, administrators, or administrators with the will annexed, and one or more of them dies, the powers hereby created shall vest in the survivor or survivors.

After administrator appointed, no executor to execute powers.
33 V., c. 18,
s. 7 (Ont.)

45. After the grant of administration with the will annexed by any court of competent jurisdiction in Ontario, no executor named in the said will shall execute any of the powers contained in the will, and of the nature above mentioned, unless such letters of administration be first revoked.

Acts repealed.

46. The Acts described in the Schedule to this Act are, except so far as the same relate to any wills to which this Act does not extend, repealed to the extent in the third column of the said Schedule mentioned; but such repeal shall not revive any Act or provision of law repealed by them, nor shall the said repeal prevent the application of any of the said Acts, or of any Act or provision of laws formerly in force, to any transaction, matter or thing anterior to the said repeal to which they would otherwise apply.

SCHEDULE.

ACTS REPEALED.	TITLE OF ACTS REPEALED.	EXTENT OF REPEAL.
32 Hen. 8, cap. 1 (Imperial Act).	The Act of Wills, Wards and Primer Seizins, whereby a man may devise two parts of his land.	The whole Act.
34 & 35 Hen. 8, cap. 5 (Imperial Act).	The Bill concerning the explanation of Wills.	The whole Act.
29 Car. 2, cap. 3 (Imperial Act).	An Act for the prevention of frauds and perjuries.	Sections 5, 6, 12, 19, 20, 21 and 22.
4 & 5 Anne, cap. 16 (Imperial Act).	An Act for the amendment of the law and the better advancement of justice.	Section 14.
14 Geo. 2, cap. 20 (Imperial Act).	An Act to amend the law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled, "An Act for the prevention of Frauds and Perjuries."	Section 9.
25 Geo. 2, cap. 6 (Imperial Act).	An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning real estates in that part of Great Britain called England, and in His Majesty's colonies and plantations in America.	The whole Act.
Con. Stat. U. C., cap. 73.	An Act respecting certain separate rights of married women.	Section 16.
Con. Stat. U. C., cap. 82.	An Act respecting real property.	Sections 11, 12 and 13.
29 Vic., cap. 28 (Pro- vince of Canada.)	An Act respecting the Law of Property and Trusts.	Sections 13, 14, 15, 16, 17 and 33.
32 Vic., cap. 8 (Ontario).	An Act to amend the law as to Wills.	The whole Act.
33 Vic., cap. 18 (Ontario).	An Act to amend the law respecting the powers of Executors and Administrators.	The whole Act.
35 Vic., cap. 15 (Ontario).	An Act further to amend the law relating to Property and Trusts.	The whole Act.

APPENDIX II.

FORMS OF WILLS AND FAMILY SETTLEMENTS, ETC., WITH NOTES.

No. I.

APPENDIX II. IN the name of God : Amen. I, A. B., being in sound health of body, and of disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time made. I commend my spirit to my merciful Creator, Redeemer and Sanctifier, and, in the hope of a joyful resurrection, I commit my body, in Christian burial, to the earth, in the church-yard of St. Paul's Church, in ———, according to the direction and discretion of my executors hereinafter named (a).

1. I DIRECT that all my just debts, including funeral expenses and the expenses of administration, be paid by my executors.

2. I BEQUEATH to my beloved wife (A. B.), one thousand dollars annually, in equal quarterly payments, in

(a) These formalities were, for many years, almost universal in the English practice. But they are now but seldom found in English wills. Hayes & Jarm. Wills, p. 102 et seq. It is common, in drawing wills, for those in declining health, or in extreme sickness, to advert to that fact, in the introductory part of the instrument, as coming nearer to what the testator himself might be expected to say if he were his own amanuensis ; thus :

I, A. B., "being in declining health;" or "labouring under a severe and painful malady;" "but, in my own apprehension and belief, in the full and perfect possession of my mental faculties," &c.

But there is such a disposition among men, even those who have no real feeling of seriousness upon any subject, to flatter themselves that they are setting an example of becoming solemnity when they give

utterance to sad and sombre words, that it often causes a shrinking, with the earnest-minded and truly thoughtful, from giving utterance to any such words, even in the solemn act of inditing their own testaments, lest they might be suspected of affectation. It is of some consequence, therefore, to suit these matters, as far as practicable, to the taste of the testator. But in drawing wills, we have, more and more, of late, especially, fallen into the use of the English practice of introducing a will in the simplest form, as in No. II. and the following form. The following is as good form as can be adopted :

"I, John Doe, of —, in the —, do hereby make and publish my last will and testament, intending thereby to dispose of all my worldly estate of which I shall be possessed at the time of my decease."

advance, reckoning from the first day of January in each year, as the means of supporting herself and family, so long as she remains my widow, the first payment for the current quarter to be made within one month after my decease. I also give and devise to my said wife the use of my mansion house in ———, free of rent, and expenses of repairs and taxes, during the term of her natural life, to be occupied by herself, or any other person to whom she shall give permission.

3. I DEVISE and BEQUEATH all the residue and remainder of my estate, both real and personal, to my children which shall survive me; and to the legal issue of any deceased child or children, by way of representation of such child or children, and to the heirs and assigns of such children for ever, in equal parts.

4. If none of my children shall survive me, and there shall, at my decease, remain no issue of any of my deceased children, then I DEVISE and BEQUEATH all such residue of my estate to such persons as may be my lawful heirs and distributees, at that time, to be distributed according to the statutes then in force; or to such charitable and religious societies as are hereafter named, in proportion to the several sums attached to the names of such societies respectively. And I hereby appoint A. B. the executor of this my last will. In witness whereof, I have hereunder set my hand, this ——— day of ———, in the year of our Lord ———.

(Signed) [Testator's signature.]

Signed, by the said testator [name], as for his last will and testament, in the presence of us present at the same time, who, at his request, in his sight and presence, and in the presence of each other, have subscribed our names as attesting witnesses (a).

(Two witnesses.)

(a) Messrs. Hayes & Jarman, in their book of Forms of Wills, 101, 102, suggest, with great propriety, that, in the selection of witnesses, those of intelligence and respectability should be preferred, and when practicable, professional men; inasmuch as their attestation of the will by a formal clause of attestation tends very strongly to show that all the formalities therein enumerated were duly complied

with. It is of some importance, too, especially in large towns, and in a country where the population is proverbially migratory, to select such, as might readily be found, to prove the execution of the will at the time of probate.

As, under the present English statute, wills of personalty are required to be executed with the same formalities as other wills, it has be-

APPENDIX II.

No. II.

COMMON FORM OF WILL.

APPENDIX II. 1. I give, devise, and bequeath unto my beloved wife (A. B.), all my remaining estate, both real and personal, in whatever it may consist, or wherever situated, at the time of my decease, to be by her used and disposed of, during her natural life, precisely the same as I myself might do were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same, in the same manner I might do if living; and to distribute the same by gift, or otherwise, among my children at any time during her life as to her shall seem meet and proper; and to appoint the same among my said children, by will, after her decease, according to her own judgment and discretion.

2. But if any of my said estate shall remain undisposed of by my said wife, at the time of her decease, I give, devise, and bequeath all such residue and remainder of my said estate, to be equally divided among my children who shall be living at that time, and the issue of any child who may have then deceased; such issue taking the share to which such deceased child would be entitled, if living.

3. But I hereby DIRECT, that the share of any of my daughters, who shall be then living, shall not absolutely vest in any such daughter, but her share shall be retained by my executors and trustees, for the time being, whether appointed by me, or by the proper tribunals, and put at interest, or upon rent, and only the income thereof paid to my said daughters, or any of them, during their natural lives, and after their decease, the whole shares of such daughters, or either of them, to be

come a frequent practice there, to have instructions for preparing wills, and all correspondence between testators and the intended beneficiaries under their wills; and which, from the peril of sickness, or other casualty, may fail of being carried into effect, by reason of not being reduced to the requisite statutory form; to have all such provisional testamentary acts executed before the requisite number of witnesses, and

with all due formalities, so as to be operative, as testamentary dispositions, in the event of any accident occurring to prevent the due execution of the more formal instrument, in contemplation. *Hayes & Jarm. Wills*, 101, 102; ante, p. 231.

[These precautions should also be used in this Province, as "The Wills Act, 1873," is similar to the English Act. See ante, pp. 230, 231.]

equally distributed among their and each of their lawful APPENDIX II.
 heirs, according to the laws of this Province. And I hereby expressly direct, that no part of the share of any of my said daughters, or of the income thereof, shall be in any manner subject to the control of any husband of any of my said daughters, or liable under any mortgage, pledge, or other contract of such husbands, or in any manner liable for any debt of such husband. But my trustees shall retain the entire property of the share of any of my said daughters, whether it be of real or personal estate, during the life of said daughters, and pay over the use and income thereof, quarterly, or oftener, as may be convenient for them, into the hands of my said daughters, or any of them, upon their own sole receipt therefor. And I hereby appoint, &c. In witness whereof, &c.

No. III.

DEED OR WILL IN TRUST.

I, A. B., of, &c., do hereby give, grant, alien, convey, and confirm, &c., or devise and bequeath unto A. B., and C. D., of, &c., and their heirs, the following described real and personal estate :

or the residue and remainder of all my estate, real and personal, of which I shall die seized and possessed, after the payment of my debts and the expenses of administration, together with such legacies and bequests as are hereinbefore made ; or as I have made in my will, bearing even date herewith, together with any codicil which I may hereafter add to the same ; or as I shall hereafter make by any will or codicil remaining unrevoked at the time of my decease.

IN TRUST : For the following purposes.

1. To pay my dear wife, A. B., for and during the term of her natural life, one thousand dollars annually, in equal quarterly payments, reckoning from the first day of January in each year, the first payment to be made within one month after my decease, for the current quarter.

APPENDIX II. 2. To pay the expense of supporting, maintaining, and educating each and all my said children, in such manner as my wife, with the advice of my trustees, shall deem suitable and proper, until the sons shall arrive at the age of twenty-one years, and the daughters shall arrive at that age, or shall marry.

3. To pay to each of my sons at the age of twenty-one years, and during his natural life thereafter, each and every year, in equal quarterly payments, reckoning from the first day of January, one thousand dollars, the first payment, for the current quarter, to be made within one month after my sons shall severally arrive at majority; and to pay the same sum to my daughters, respectively, in the same manner, upon their marriage or arriving at the age of twenty-one years, whichever shall first happen.

4. Upon the decease of any of my said children, leaving issue, to pay the said sum of one thousand dollars annually to such issue or to the legal guardian of such issue, in the same manner any of my said deceased children would have been entitled to receive the same, if still living.

5. Upon the decease of the last surviving one of my children, my trustees shall convey all the remaining part of my estate hereinbefore conveyed to them, together with any income of the same remaining in their hands, to the heirs and legal representatives of my deceased children, in equal shares, according to the number of my deceased children so represented, such heirs and legal representatives taking by way of representation, and not according to their number. And I hereby appoint, &c. In witness whereof, &c.

In this manner the trusts may be made more or less numerous and extended.

No. IV.

WILL GIVING TO ONE ABSOLUTELY ALL THE TESTATOR'S
REAL AND PERSONAL ESTATE.

This is the last will and testament of me [*testator's name, residence and occupation*]. I devise and bequeath all the

real and personal estate to which I shall be entitled at the time of my decease, unto [*devisee's name and residence*], absolutely ; but, as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively. And I appoint the said [*name*] sole executor of this my will, hereby revoking all other testamentary writings. In witness whereof, &c.

No. V.

WILL DISPOSING OF REAL AND PERSONAL ESTATE IN FAVOUR OF TWO SONS, OF WHOM ONE IS AN ADULT AND THE OTHER A MINOR ; GIVING TO THE DEVISEES A POWER OF APPOINTMENT OVER THE REAL ESTATE. DIRECTION TO PURCHASE A LIFE ANNUITY.

This is the last will and testament of me [*testator's name and residence*]. I devise the dwelling-house at —, in which I now reside, with the garden, orchard, and the appurtenances thereto belonging, and also the pieces of land called respectively [*names*], now in my occupation, situate in the said — of —, with the easements and appurtenances therewith usually occupied or enjoyed, unto my eldest son [*name*], his heirs and assigns. And I devise my messuage and lands situate at —, now in the occupation of [*tenant*] under a lease, with the easements and appurtenances therewith usually occupied or enjoyed, to my younger son, &c. But in case my said younger son shall die under the age of twenty-one years, then I devise the last-mentioned hereditaments and premises, in the same manner as hereinbefore is expressed concerning the other hereditaments and premises hereinbefore firstly devised. And in case my said younger son shall at my decease be under the age of twenty-one years, I empower and direct my executors or administrators, executor or administrator, for the time being, during his minority, to let from year to year, or for any term not exceeding [*seven*] years in possession, at the best rent, and to manage in all respects the hereditaments hereinbefore devised to him, and to receive the rents and profits thereof, and after payment of the incidental outgoings and

APPENDIX II. expenses, to apply the net rents and profits, or an adequate part thereof, in his maintenance and education, and to invest the unapplied surplus, if any, in or upon the public funds or securities of the [—], or real or leasehold securities in [—] (and not elsewhere), or in or upon any other security, and improve the same as an accumulating fund, varying the investment from time to time, as often as may be thought proper, for any other of the kinds aforesaid; but with liberty to apply the income, and, if deemed necessary, the capital also, of the same fund, for the maintenance or advancement in life of my said son; and the same fund, or so much thereof as shall not be so applied, shall, in the event of his attainment of the age of twenty-one years, be his absolute property; but in the event of his death under that age, shall be the absolute property of my said elder son. I direct my executors to purchase, within twelve calendar months after my decease, in the name and for the benefit of my servant [*name*], an irredeemable annuity of \$— for her life, payable in equal half-yearly or quarterly portions, such purchase to be made in the discretion of my executors, either from Government or any public company, or from any private person or persons, but so that the annuity, if purchased from any private person or persons, shall be well secured on freehold or leasehold property. And I direct that until such purchase shall be made, a like annuity shall be paid her out of my general personal estate, in equal quarterly portions, the first portion to be paid at the end of three calendar months from my decease; And I declare, that the said annuitant, or her executors or administrators, shall not be allowed to have the value of the said annuity in lieu thereof. I give to my said younger son, if he shall attain the age of twenty-one years, the sum of \$—, to be transferred to him within three calendar months after he shall attain that age, or, if he should attain it in my lifetime, within three calendar months after my decease. I direct that the expenses incident to the bequests of the annuity and stock legacy, hereinbefore respectively bequeathed, shall be paid out of my residuary personal estate. As to the residue of the real and personal property whatsoever and wheresoever which may belong to me at my decease, I devise and bequeath the same to my said

elder son, his heirs, executors, and administrators, absolutely; but subject as to property vested in me as trustee or mortgagee, to the trusts and equities affecting the same respectively. I appoint my said elder son and [names] the executors of this my will, with power to compound debts and settle claims against or in favour of my estate, and to retain and allow to each other the expenses of executing my will; And I constitute my executor or executors for the time being guardians or guardian of my said younger son during his minority. Lastly, I revoke all former wills, and declare that this writing, consisting of three sheets of paper, contains the whole of my will. In witness whereof, I have hereunder set my hand, and I have also set my hand to each of the preceding sheets of this my will, this — day of —, in the year of our Lord —, &c.

No. VI.

WILL DEVISING REAL ESTATE TO TRUSTEES.

Will devising real estate to trustees, upon trusts for raising money, by mortgage, in aid of the personal estate, to pay debts and legacies; and, subject thereto, for the testator's son and his issue, in strict settlement; and, failing such issue, for raising certain sums; and, subject thereto, for collateral relations. Power of leasing. Specific bequest of leasehold for years, and other specific legacies. Bequest of annuities and pecuniary legacies. Devise of mortgage and trust estates. Power to give discharges to mortgagees and others. Power to appoint new trustees.

This is the last will and testament of me [*testator's name, residence and occupation*]. I devise all the freehold manors, messuages, lands, tenements, and hereditaments, to which I may be entitled at my decease, with their appurtenances, unto and to the use of [*trustees*], their heirs and assigns, upon the trusts following: (namely,) upon trust, in the first place, with or out of the rents and profits of the said devised estates, or by mortgaging or charging the same or a competent part or parts thereof, to raise, in aid of my personal estate (if insufficient), so much money as shall be requisite to satisfy my funeral and testamentary expenses and debts, and the annuities and pecuniary

APPENDIX II. legacies hereinafter bequeathed, together with the expenses of executing this trust, and to apply the money to be so raised accordingly ; And, subject thereto, in trust for my son (*name*) and his assigns during his life, without (as to the said freehold hereditaments) impeachment of waste. And immediately after his decease in trust for the first and every other son successively, according to seniority of birth, of my said [son], and the heirs (*or*, heirs male) of the body of each such son. And, failing such issue, in trust for the daughters of my said son, equally, as tenants in common, and the heirs of their respective bodies, with trust limitations in the nature of cross remainders between such daughters and the heirs of their respective bodies, as to both the original and the accruing shares. And, failing such issue, upon trust, with or out of the rents and profits of the said devised estates, or by mortgaging or charging the same or a competent part or parts thereof, to raise and pay to the respective persons or classes of persons next hereinafter named or described, if living at the time of the failure of the antecedent trusts, the respective sums of money which immediately follow their respective names or descriptions (*viz.*), [*name*, &c.], \$—; [*name*, &c.], \$—, &c. The children of my sister [*name*], who, either before or after the time last mentioned, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, \$— apiece. The children of, &c., \$— apiece. And, subject thereto, as to one undivided moiety of my said devised estates, in trust for my brother [*name*], his heirs and assigns. And as to the other undivided moiety thereof, in trust for my nephews [*names*], equally, as tenants in common, their respective heirs and assigns. And I empower my trustees or trustee for the time being, during the life of my said son [*name*], with his consent in writing, and after his decease and during the minority or respective minorities of any infant tenant or tenants in tail for the time being, entitled under the trusts aforesaid, in the discretion of such trustees or trustee, to grant leases of my said devised estates or any part thereof for a term or terms not exceeding [*twenty-one*] years in possession, at the best rent or rents, to be incident to the immediate reversion, without taking any fine or premium. I devise the leasehold messuage in

which I now reside, situate at——, and held by me under APPENDIX II. a lease dated, &c., with the appurtenances, to my wife [name], for her life, if my term therein shall so long endure, and, after her decease, to my said son [name], his executors, administrators and assigns, for the then residue, if any, of such term. I bequeath the several specific legacies following (viz.): To my said wife, all the wines, fuel, liquors, and other consumable household stores and provisions which shall belong to me at my decease, for her absolute use; To, &c. I bequeath to the several persons next hereinafter named, for their respective lives, the several annuities which follow their respective names (viz.): To my said wife, \$—— a year, in addition to the provision made for her by the settlement on our marriage. To each of my sisters [names], \$—— a year; To, &c. And I direct such annuities to be paid in equal portions quarterly, on the four usual quarterly days of payments of rent in the year, and the first quarterly portion to be paid on such of the said days as shall occur next after my decease; but no proportions of the said annuities shall be payable for the days elapsed at the deaths of the respective annuitants of the then current quarter. And I direct funds to be appropriated in the names or name of my trustees or trustee for the time being, out of my personal estate (but not by mortgaging or charging my real estate), sufficient, at the period of appropriation, to answer, by means of the income thereof, the payment of the same annuities; which funds, on the dropping of the respective annuities, shall follow the destination of the residue of my personal estate. I bequeath to the several persons next hereinafter named the several legacies which follow their respective names (viz.): To my niece [name], in addition to the provision made for her by the settlement executed by me on her marriage, the sum of \$——. To my niece [name], the sum of \$—— (in satisfaction of a legacy bequeathed to her by the will of ——, and received by me). To my nephew [name], the sum of \$—— (which legacy, together with the sum of \$——, advanced by me for the purpose of ——, makes up the sum of \$——, which I originally promised to leave him). And I direct the said pecuniary legacies to be paid at the end of —— calendar months next after my decease. And I declare, that such of the annuities and pecuniary

APPENDIX II. legacies hereinbefore bequeathed as shall lapse or fail by the deaths of legatees in my lifetime, or otherwise, shall, so far as the same may charge or affect my real estate, lapse or fail for the benefit of my devisees, and not of my heir. I bequeath the residue of my personal estate unto my said son [name], for his absolute benefit. I devise all the real estates vested in me as mortgagee or trustee to my said trustees, their heirs and assigns, subject to the trusts and equities affecting the same respectively. I declare, that any mortgage made by the trustees or trustee for the time being of my will may, in their or his discretion, contain a power of sale. And I further declare, that the receipts of the trustees or trustee for the time being of my will, shall effectually exonerate mortgagees and others paying moneys to such trustees or trustee from all liability in respect of the application thereof; also, that every mortgage and charge to be made or created by my trustees or trustee for the time being, shall, in favour of the mortgagee or lender, be presumed to be necessary and proper. I empower my said son [name], during his life, and, after his decease, the trustees or trustee for the time being of my will, if any, or, if none, the executors or administrators of the last deceased trustee, or either or any of such executors or administrators, to nominate, in writing, any person or persons to supply the place of any trustee or trustees of my will, who shall die, whether in my lifetime or after my decease, or disclaim, or be unwilling or unable to act. And on every such appointment the necessary assurances shall be executed for vesting my trust estate in the new and old trustees, or in the new trustees solely, as the case may be. And I absolve the trustees and trustee for the time being of my will from responsibility for the receipts and defaults of each other, and for involuntary losses. And also authorize such trustees and trustee to retain and allow to each other all expenses incurred in or about the execution of the trusts of my will. I appoint [trustees] to be executors of my will. And lastly, I revoke all former wills, declaring this writing alone to express the whole of my will. In witness, &c.

No. VII.

WILL OF A MARRIED MAN.

Will of a married man, providing for a wife and his son, an only child. Bequest of household effects to wife. Pecuniary legacy to testator's mother for life, then to his sister absolutely. Devise of real estates to wife for life, remainder to his son absolutely, with an executory devise, on his death under age, to wife absolutely. Power to lease. Bequest of residuary personal estate, to trustees for conversion and investment. Income to wife for life. Capital to son, with executory bequest, on his death under age, to wife. Provisions for maintenance and advancement of son. Powers to sell real estate, and invest the produce, to be held upon the trusts of the personal estate. To postpone the conversion of personal estate; to compound debts, &c.; to give receipts; to appoint trustees. Appointment of executors and guardians.

This is the last will and testament of me [*testator's name*, APPENDIX II. *residence and occupation*]. I bequeath to my trustees and executors hereinafter named, \$—— apiece, and to my friends [*names, &c.*], \$—— apiece, for a ring in remembrance of me. And I bequeath to my said trustees the sum of \$——, upon trust, to invest the same in the names or name of the trustees or trustee for the time being of my will, in or on the public funds or government or real securities in the ——, or on railway debentures, and to pay the annual income thereof to my mother [*name*] during her life, and after her decease to transfer the principal fund to my sister [*name*], for her absolute use; and I empower my said trustees or trustee, with the consent in writing of my said mother, to change from time to time the investment of the same sum from any of the said funds or securities to any other or others of a like nature; and I direct the aforesaid legacies to be retained or paid at the end of three calendar months after my decease, and the lastly bequeathed legacy to carry interest at the rate of four per cent. per annum from my decease. I bequeath all the furniture, plate, linen, china, glass, books, prints, pictures, wines, liquors, fuel, consumable provisions, and other household effects, of which I shall die possessed, unto my dear wife [*name*] absolutely. I devise all the real estate, of whatsoever tenure and wheresoever situate (including chattels real), to which I shall at my decease be entitled, either in possession, reversion, or otherwise

APPENDIX II. (except estates vested in me as trustee or mortgagee), unto my said wife [name], and her assigns, for her life, without impeachment of waste, so far as I can grant that privilege, and after her decease unto my son and only child [name], his heirs, executors, administrators and assigns; but if my said son shall die under the age of twenty-one years (or under the age of twenty-one years without leaving issue), then I devise the same real estate and chattels real unto my said wife, her heirs, executors, administrators and assigns. And I empower my said wife, during her life, and after her decease, the trustees or trustee for the time being of my will, during the minority of my said son, to grant leases of my said real estate, or any part or parts thereof, for any term or terms of years, not exceeding [twenty-one] years in possession, at the best rent, without taking any fine or premium, and upon such terms, in other respects, as the lessors or lessor shall think reasonable. I bequeath the residue of my personal estate to my trustees hereinafter named, upon trust, to convert and get in such residuary personal estate, and invest the moneys to arise therefrom in the names or name of the trustees or trustee for the time being of my will in or on the public funds or government or real securities in the —; and upon further trust to permit and empower my said wife to receive the annual income of the said moneys, or the securities whereon the same shall be invested, during her life; and after her death, as to the same moneys and securities, and the annual income thenceforth to become due for the same, in trust for my said son, his executors, administrators and assigns; but if my said son shall die under the age of twenty-one years (or under the age of twenty-one years without leaving issue), then in trust for my said wife, her executors, administrators and assigns; and I empower my said trustees or trustee, with the consent in writing of my said wife, whether covert or sole, and after her decease, and during the minority of my said son, in the discretion of my said trustees or trustee, to change from time to time the investment of the last-mentioned moneys from any of the said funds or securities, to any other or others of the like nature. I further empower my said trustees or trustee, after the decease of my said wife, to apply such part, as they or he shall deem expe-

dient, of the income of the real and personal property APPENDIX II.
hereinbefore devised and bequeathed to or in trust for my
said son, in or toward his maintenance and education, or
otherwise for his benefit, during his minority. And I
direct my said trustees or trustee to accumulate, during
his minority, the unapplied income, by investing the same,
with power to vary the investment as aforesaid, and to add
the accumulations thereof to the capital of the personal
property so bequeathed. I further empower my said
trustees or trustee, with the consent in writing of my said
wife, whether sole or covert, during her life, and after her
decease, and during the minority of my said son, in the
discretion of my said trustees or trustee, to apply any part
or parts of the personal property so bequeathed as last
aforesaid, or of the said accumulations, not exceeding in
the whole the sum of \$——, in or toward the advance-
ment or preferment in the world of my said son. I
further empower my said trustees or trustee, if they or he
shall think it advantageous so to do, at any time or times,
with the consent in writing of my said wife, whether
covert or sole, and after her decease, and during the minor-
ity of my said son, in the discretion of my said trustees
or trustee, to sell my said real estate, or any part or parts
thereof, together or in parcels, by public sale or private
contract, and convey the real estate so sold unto or
according to the direction of the purchaser or purchasers
thereof, with power to make any special conditions of sale
as to the title or evidence of title, or otherwise, and with
power to buy in the premises at any public sale, or to
rescind either on terms or gratuitously any contract, and
to resell without being answerable for any loss. And I
direct that my said trustees or trustee shall invest the
moneys to arise from the sale thereof in the manner here-
inbefore directed concerning the moneys to arise from my
residuary personal estate, and shall hold the funds or
securities whereon such investment shall be made upon
the trusts hereinbefore contained concerning the funds or
securities whereon the produce of my residuary personal
estate may be invested. I declare, that my said trustees
or trustee shall have a discretionary power to postpone,
for such period as to them or him shall seem expedient,
the conversion or getting in of any part of my residuary
personal estate, which shall at my decease consist of shares

APPENDIX II. in public companies, or of stocks, funds, or securities of any description whatsoever, but the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys and funds and securities aforesaid, and the yearly proceeds thereof shall be deemed annual income for the purposes of such trusts. I devise all real estates which shall at my decease be vested in me as trustee or mortgagee, to my trustees hereinafter named, subject to the equities affecting the same respectively. I empower the trustees or trustee for the time being of my will to give receipts for all moneys and effects to be paid, transferred or delivered to such trustees or trustee by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from all liability, to see to the application or disposition of the money or effects therein mentioned, and as to any purchaser from inquiring into the necessity for or propriety of any sale or sales purporting to be made under the powers of this my will. I empower the trustees or trustee for the time being of my will to compound or allow time for the payment of any debt or debts due to my estate, and to satisfy all demands against my estate, whether supported by strictly legal evidence or not; and to settle all accounts between me and any person or persons on such terms as my said trustees or trustee shall in their or his discretion think expedient; and to refer any matters in difference relating to my affairs to arbitration. I declare, that, if my trustees hereinafter named, or any or either of them, shall die in my lifetime, or if they or any or either of them, or any trustees or trustee to be appointed under this clause, shall after my death die, or be unwilling, incompetent, or unfit to accept or execute the trusts of my will, or desire to retire from the office, it shall be lawful for my wife, whether covert or sole, and after her death, for the trustees or trustee for the time being, if any, of my will, whether retiring from the office of trustee or not, or, if none, for the proving executors or executor for the time being, or for the administrators or administrator for the time being of the last deceased trustee, to substitute, by any writing under her, their or his hands or hand, any person or persons to be trustee or trustees in the place of the person or persons so dying (whether in my lifetime or afterwards), or refusing, or being incompetent, or unfit to act, or desiring to retire

from office. And I exempt every trustee of my will from APPENDIX II. liability for losses occurring without his own wilful default, and authorize him to retain and allow to his co-trustees all expenses incidental to the trusteeship. I appoint my friends [*names and descriptions*] to be trustees of my will; and I appoint my said wife [*name*], and the said [*trustees*] executrix and executors of my will, and guardians of my said son [*name*] during his minority. Lastly, I revoke all other wills. In witness, &c. (a)

No. VIII.

WILL OF A MARRIED MAN.

Will of a married man, providing for the wife and younger children; the eldest son having been provided for. Rent-charge to wife reducible on marriage. Residue (real and personal) to younger children, with executory limitations between them and the eldest son.

This is the last will and testament of me [testator's name, residence and quality]. I bequeath to my dear wife [*name*], all my household furniture, plate, linen, glass, china, books, pictures, prints, wines, liquors, fuel, house-keeping stores and provisions, and other effects of the like nature, and the sum of \$——, to be paid to her out of the

(a) As the law does not allow the trustees to reinvest trust funds, which had been once invested, either by themselves, or by the testator, during his lifetime, it is proper, in placing personal estate in trust, to give the trustees a discretion to invest the same, at pleasure, by the written consent of the person entitled to the immediate income. *Hayes & Jarman*, 208; *Sugden, Vendors & P.* 546.

The appointment of testamentary guardians is regulated chiefly by statute. It does not extend to infant children married before the decease of the testator. *Earl of Shaftesbury's Case*, cited in 3 *Atk.* 625. But if appointed, and the testator decease before the marriage, the guardianship is not revoked by the marriage, *id.*

The right of the courts of equity to interfere in the guardianship of children, and to remove them from their natural or testamentary guardians, is extensively discussed by Vice-Chancellor *Kindersley*, in *Curtis v. Curtis*, 5 *Jur. N. S.* 1147, where it is held, that a child cannot be removed from the custody of the father or mother, merely because it would be for the benefit of the child. That the peculiar religious opinions, or the poverty of the father, form no ground of interference by the court. That mere acts of harshness or severity by a father, not such as would be injurious to the health of the children; or the fact of a somewhat passionate temper, will not form grounds for removing the children from his custody. See also, *Re Fynn*, 2 *De G. & Sm.* 457.

APPENDIX II. first moneys which shall come to the hands of my executors. I bequeath to my eldest son [*name*] (for whom I have already provided), the sum of \$—— only, to be paid to him at the end of —— calendar months next after my decease. I devise to my said wife a yearly rent-charge of \$—— for her life, if she shall so long continue my widow; but if she shall marry again, then a yearly rent-charge of \$—— only, for the remainder of her life, the said yearly rent-charge of \$——, or \$—— (as the case may be), to be charged upon and issuing out of all the freehold hereditaments situate in the county of ——, to which I shall be entitled at my decease, and to be payable half-yearly, without deduction; and the first payment of the said yearly rent-charge of \$—— to be made at the end of six calendar months computed from my decease, if my said wife shall be then living and my widow, and the first payment of the said yearly rent-charge of \$—— to be made at the end of six calendar months computed from the second marriage of my said wife, and a proportionate part of each yearly rent-charge to be paid down to the determination thereof. And I empower my said wife, by distress, and also by entry upon and perception of the rents and profits of my said hereditaments, so charged as aforesaid, to recover payment of the said rent-charges, respectively, when in arrear for twenty-one days. I devise and bequeath all the real estate, and the residue of the personal estate, to which I shall be entitled at my decease (but, as to my freehold hereditaments so charged as aforesaid, subject to such of the rent-charges as shall for the time being be payable), unto my younger children [*names*], in equal shares, as tenants in common, their respective heirs, executors, administrators, and assigns. But if any of them shall die under the age of twenty-one years, without leaving issue, then I devise and bequeath the share or shares, as well original as accruing, of such of them as shall so die, to my said eldest son, and to the others or other of my said younger children, in equal shares, as tenants in common, their respective heirs, executors, administrators, and assigns. And I direct and empower my trustees hereinafter named, during the minorities of such of my said younger children as shall be under age at my decease, to receive the annual income of their respective shares of my real

and residuary personal estate, and to apply the same, or APPEN
so much thereof as such trustees shall think expedient, in
or towards the maintenance and education, or otherwise
for the benefit of such children respectively, and to invest
and accumulate the unapplied surplus, and add the accu-
mulations to the respective shares whence the same shall
have arisen ; and also to apply, in or towards the advance-
ment in the world of such children respectively, any part,
not exceeding one-half, of the principal or value of their
respective shares, and for that purpose to raise, by mort-
gaging or charging my real estate, or any part or parts
thereof, such sum or sums of money as my said trustees
shall think fit. I also direct and empower my said trust-
tees to convert and get in my residuary personal estate,
as and when they shall think fit, and to invest the net
proceeds thereof, in their names, in or upon the public
stocks or funds of the —, or on real securities in —,
and to vary the investment, for any other or others of a
like nature, when and as they shall think fit, until the
same shall become distributable under the dispositions
hereinbefore contained. I also direct and empower my
said trustees, during the minorities or minority of such of
my said younger children as shall be under age at my
decease, to let my said real estate from year to year, or
for any term not exceeding (seven) years, in possession, at
the best rent, and subject to such covenants and condi-
tions as my said trustees shall think reasonable, and
generally to manage and direct all the affairs and con-
cerns of my said real estate and residuary personal estate,
so far as regards the share and interest, or respective
shares and interests, of the minor or minors, in such man-
ner as my said trustees shall in their discretion judge
most beneficial to such minor or minors. I also empower
my said trustees to compound and compromise debts and
demands claimed as due from or to my estate ; and to
settle and adjust my accounts, and to refer disputes
arising out of my affairs to arbitration (or I empower
my said trustees to compound or allow time for the pay-
ment of any debt or debts due to my estate, and to satisfy
all demands against my estate, whether supported by
strictly legal evidence or not ; and to settle all accounts
between me and any person or persons, on such terms as
my said trustees shall in their discretion think expedient ;

APPENDIX II. and to refer any matters in difference relating to my affairs to arbitration). I declare and direct, that any mortgage which shall be executed by my said trustees, may, in their discretion, contain a power of sale ; and that any mortgagee shall not be bound to inquire into the necessity of raising the moneys advanced by him. I also empower my said trustees to give effectual discharges for all moneys paid to them as such trustees. I devise to my said trustees [names], all the real estate which shall at my decease be vested in me as mortgagee or trustee, subject to the equities affecting the same respectively. I declare that, if my trustees hereinafter named, or any of them, shall die in my lifetime, or if they or any of them, or any trustees or trustee to be appointed under this clause, shall, after my death, die, or be unwilling or incompetent or unfit to accept or execute the trusts of my will, or desire to retire from the office, it shall be lawful for my wife, so long as she shall continue my widow, and, after her death or marriage, for the competent accepting trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or, if none, for the proving executors or executor for the time being, or the administrators or administrator for the time being of the last deceased trustee, to substitute, by any writing under her, their, or his hands or hand, any person or persons, in whom alone, or (as the case may be) jointly with any surviving or continuing trustees or trustee, my trust estates shall vest or by proper assurances be vested. And I exempt every trustee of my will from liability for losses occurring without his own wilful default (a) ; and authorize him to retain and allow to his co-trustees or co-trustee all expenses incidental to the trusteeship. And I declare that the powers and discretions hereinbefore vested in the trustees hereinafter named, shall be exercisable by the trustees or trustee for the time being of my will. I appoint my friends [names, &c.], to be trustees of my will ; and I appoint my said wife [name], she continuing my widow, and the said (trustees), to be executrix and executors of my will and guardians of my children during their respective minorities. Lastly, I revoke all other wills. In witness, &c.

(a) See 29 Vict., c. 28, s. 32, as to the provisions regarding trustees, which are to be presumed to be

contained in every deed, will or other document creating a trust.

No. IX.

WILL OF A MARRIED MAN.

Will of a married man, providing for a wife and adult children.

Bequest to wife of wines, &c., and the use of furniture. Real estate, and residue of personal estate, vested in trustees for sale and conversion; income to wife for life. Legacy out of capital to one child, and surplus among the other children; share of daughter for her separate use. Trustees not to sell real estate in wife's lifetime without her consent, and to be at liberty to postpone the conversion of personalty. Devise of mortgage and trust estates. Powers to give receipts, compound debts, and appoint trustees. Appointment of executors.

This is the last will and testament of me [*testator's name, &c.*] I bequeath the wines, liquors, fuel, and other consumable household stores and provisions, and the linen, china, and glass, of which I shall die possessed, to my dear wife [*name*], absolutely. I bequeath to my said wife the use and enjoyment, during her life, of the household furniture and utensils not hereinbefore bequeathed, and the plate, books, pictures, and prints of which I shall die possessed. And after her decease, I direct the same articles to be disposed of as part of the residue of my personal estate (or, I bequeath the same to my four children [*names*], to be divided between them as nearly as may be in equal shares, and if any dispute shall arise concerning the division thereof, then such division shall be made by the trustees or trustee for the time being of my will, whose determination shall be final). And I direct my executors to cause an inventory to be taken of the same articles before the delivery thereof to my said wife, and two copies of such inventory to be signed by my said wife, of which copies so signed one shall be delivered to her, and the other be kept by my executors. I devise all the real estate to which I shall be entitled at my decease (except estates vested in me as trustee or mortgagee), and I bequeath the residue of the personal estate to which I shall be then entitled, to [*names, &c.*], their heirs, executors, administrators, and assigns, respectively, upon trust to sell my real and leasehold estates, together or in parcels, by public auction or private contract, with power to make any special conditions as to title or evidence of title, or otherwise, and with

APPENDIX II.

APPENDIX II. power to buy in the premises at any public sale, or to rescind either on terms or gratuitously any contract, and to resell without being answerable for any consequent loss ; and to convey and assign the premises respectively so sold to the purchaser or purchasers thereof ; and to convert and get in my other residuary personal estate, and invest the moneys to arise from such real and leasehold estates, and residuary personal estate, in the names or name of the trustees or trustee for the time being of my will, in or upon any of the public stocks, funds, or securities of the ———, or any real or leasehold securities in ———, with liberty for the said trustees or trustee, with the consent in writing of my said wife, to vary and transpose the investment from time to time for any other investment of the description aforesaid ; and upon further trust to permit and empower my said wife to receive the annual income of the said moneys, or the stocks, funds, and securities whereon the same shall be invested, during her life ; and after her death, as to the said moneys, stocks, funds, and securities, and the annual income thenceforth to become due for the same, upon trust to pay thereout to my said son [*name*], his executors, administrators, or assigns, the sum of \$——, which sum shall be absolutely vested in him on my decease, and shall carry interest after the rate of \$— per cent. per annum from the decease of my said wife until payment thereof ; and, subject to the payment of the same sum and interest, in trust for my other children [*names*], to be divided equally among them, their respective executors, administrators, and assigns ; and the respective shares of such children to be absolutely vested on my decease ; and the share of my said daughter [*name*] to be received, enjoyed, and disposed of by her as her separate estate, without the control or interference of her present or any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same. Nevertheless, I declare, that no sale of my real estate, or any part thereof, shall be made in the lifetime of my said wife, without her previous consent in writing ; and that my trustees or trustee for the time being shall have a discretionary power to postpone, for such period as to them or him shall seem expedient, the conversion or getting in of any part of my residuary personal estate, which shall

at my decease consist of stocks, funds, shares, or securities of any description whatever; but the unsold real estate, and outstanding personal estate, shall be subject to the trusts hereinbefore contained concerning the moneys, stocks, funds, and securities aforesaid, and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts, and such real estate shall be transmissible as personal estate under the ultimate trust hereinbefore contained. I devise all real estates (if any) vested in me as trustee or mortgagee to the said [trustees], their heirs and assigns, subject to the equities affecting the same respectively. I empower the trustees or trustee for the time being of this my will to give receipts for all moneys and effects to be paid or delivered to such trustees or trustee by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from liability to see to the application or disposition of the moneys or effects therein mentioned. I empower the trustees or trustee for the time being of my will to compound or allow time for the payment of any debt or debts due to my estate, and to settle all demands against my estate, and all accounts between me and any person or persons, on such terms as my said trustees or trustee shall in their or his discretion think expedient, and to refer any matters in difference relating to my affairs to arbitration. I declare, that if my said trustees, or any of them, shall die in my lifetime, or if they or any of them, or any person or persons to be appointed under this clause, or in any other manner, shall, after my death, die, or be unwilling, incompetent, or unfit to execute the trusts of my will, or desire to retire from the office, it shall be lawful for my said wife during her life, and, after her death, for the competent trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or, if none, for the acting executors or executor for the time being, or the administrators or administrator for the time being, of the last surviving trustee, to substitute, by any writing under her, his, or their hand or hands, any fit person or persons, in whom alone, or, as the case may be, jointly with the surviving or continuing trustees or trustee, my trust estate shall vest, or, by proper assurances, be vested; and I exempt every trustee of my will from liability for losses

APPENDIX II.

APPENDIX II. occurring without his own wilful default, and authorize him to retain and allow to his co-trustee or co-trustees all expenses incidental to the trusteeship. I appoint the said [*trustees*] to be executors of my will. Lastly, I revoke all other wills. In witness, &c.

No. X.

WILL OF A FARMER.

Will of a farmer, disposing of his personal property in favour of his wife and infant children. Legacies to children at twenty-one or marriage. The wife to be sole trustee and executor during widowhood; with large discretionary powers to carry on the farming-business, and manage the estate generally. Wife marrying to have an annuity; on her death or marriage the property is vested in trustees for the benefit of the children. Devise of mortgage and trust estates. Power to compound debts, &c. Provisions for appointing and indemnifying trustees.

This is the last will and testament of me [*testator's name, &c.*]. I give to each child of mine, who, being a son, shall at my death have attained the age of twenty-one years, or shall afterwards attain that age, or, being a daughter, shall at my death have attained that age or have been married, or shall afterwards attain that age or be married, a portion of \$——, to be paid to children being at my death objects of this gift, at the end of six calendar months after that event, and to children subsequently becoming objects thereof at the end of six calendar months after they shall respectively become such objects; but advances made by me to any child or children in my lifetime shall, according to the amount thereof, be taken in full or in part satisfaction of his, her, or their portion or portions, unless I shall otherwise declare by codicil to this my will. I empower my wife [*name*], to carry on my farming and grazing business, and for that purpose to continue tenant of the farm which I shall use at my decease, or to hire and use any other farm and employ my live and dead agricultural stock, and such part of my personal estate as she shall think fit, with liberty for her at any time to transfer the business to any son or sons of mine, or admit any son or sons of mine to a share thereof,

and lend to him or them the capital employed or requisite APPENDIX II.
to be employed therein, or any part thereof, upon such security and such terms as she shall think reasonable. I empower my said wife to manage my personal estate generally in such manner as shall appear to her to be most advantageous to my family, with liberty, at her discretion, either to permit it to continue in the state in which it shall be found at my death, or to get it in, and invest the proceeds in her name, upon any stocks, funds or securities, or at any rate of interest, or in the purchase of any real or personal property, and to vary the investment when and as she shall think fit (the real property so purchased to be considered as converted into and treated as personalty for all the purposes of my will). I give to my said wife all the income of so much of the personal estate to which I shall be entitled at my decease as shall be in any wise employed or invested (inclusive of the profit of the said business), and also the use of the residue thereof, but charged with the maintenance, education, and bringing-up, in a manner suitable to their station in life, of my sons for the time being under the age of twenty-one years, and my daughters for the time being under that age not being or having been married. In the event of my said wife marrying again, I thenceforth annul the powers and benefits hereinbefore given to my said wife, and give to her an annuity of \$—— during the remainder of her life, payable quarterly into her proper hands and on her personal receipt, as a separate and inalienable provision, the first payment to accrue due and be made at the end of three calendar months after her marriage, if she shall within that time account for and deliver up my personal estate in her hands to the other trustees or trustee for the time being of my will, to their or his satisfaction; and, if not, then at the end of three calendar months after such accounting and delivery. And I declare, that if my said wife shall, either before or after such her second marriage, do or suffer any act or thing whereby her said annuity of \$——, or any part thereof, shall be aliened or encumbered, the same annuity shall thereupon cease. I declare, that on the death or marriage of my said wife, my personal estate shall vest in the other trustees or trustee for the time being of my will, who shall have the same power and liberty in regard to my business as I have given to my wife by

APPENDIX II. the second clause of my will, carrying on the same for such period as the circumstances of my estate or my family shall, in the opinion of my said trustees or trustee, render it convenient or desirable so to do; and, subject thereto, shall convert or get in my personal estate not invested in stocks, funds, or securities of the —, or on real securities in the —, and invest and place out the produce in and upon investments of that description, but with liberty to continue any investments of a different description which they or he shall think it inexpedient to disturb, and with power to vary from time to time the investment of my personal estate, so as the investment be confined to stocks, funds, or securities of the description aforesaid. I declare, that the said trustees or trustee shall hold my personal estate, from and after the death or marriage of my said wife, in trust for my child, if only one, wholly, or all my children, if more than one, equally, to be absolutely vested in a son or sons at the age of twenty-one years, and in a daughter or daughters at that age or marriage; and, as to the share or shares, original and accruing, of a son or sons dying under that age, and of a daughter or daughters dying under that age without having been married, in trust for the other or others of my children, conformably to the preceding trust; with power for the said trustees or trustee to apply the whole or part of the income, and any part not exceeding one moiety of the capital of each child's original and accruing share not absolutely vested, for his or her benefit by way of maintenance, advancement, or otherwise, and the unapplied income of each such share shall be accumulated, and the accumulations be deemed an accretion to the same share. I devise all lands and hereditaments which shall, at my decease, be vested in me as mortgagee or trustee, in fee or otherwise, unto and to the use of my friends [*names, &c.*], their heirs, executors, administrators, and assigns, subject to the trusts and equities affecting the same respectively, and to the purposes of my will. I appoint my said wife, during widowhood, and on her death (or if she shall marry again, then on her marriage) my said friends [*names*], to the offices of executor and trustee of my will, and guardian of my infant children, with full powers to compound and compromise debts and claims, and settle my accounts and affairs, and to give receipts for moneys paid or

accounted for to my estate by purchasers or others, who shall be exonerated by such receipts from all liability in respect of the application of the money. And I declare, so far as concerns the trusteeship of my said friends, that vacancies occurring therein from death in my lifetime or otherwise, disclaimer, resignation, unfitness, or incapacity, may from time to time be supplied by the other trustees or trustee for the time being, or, if none such, then by the disclaiming or resigning trustees or trustee, or, if also none such, by the acting executors or executor for the time being, or the administrators or administrator for the time being, of the last deceased trustee. And I declare, that as well my said wife as the other trustees or trustee of my will, shall be chargeable only to the extent of her, his, or their respective actual receipts, and be exempt from responsibility for involuntary losses, and be entitled to retain all disbursements and expenses incident to the execution of my will. I revoke all prior wills. In witness, &c.

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No. XI.

WILL DEVISING ESTATES TO THE USES OF A STRICT SETTLEMENT MADE UPON THE TESTATOR'S MARRIAGE.

This is the last will and testament of me [*testator's name, &c.*]. Whereas, by the settlement made in contemplation of my marriage with my wife [*name*], by indentures of lease and release, bearing date respectively, &c., divers hereditaments therein described were settled by me to the use of myself for life, with remainder to the use of trustees and their heirs, during my life, to preserve contingent remainders; with remainder (subject to limitations for securing a jointure rent-charge to my wife, if she should survive me, for her life, and to a term of five hundred years for raising portions for our younger children), to the first and other sons of our marriage successively in tail male, with remainders over; which settlement contains divers powers and provisions concerning the said hereditaments. Now I do hereby devise and subject all the hereditaments of which I am competent to dispose, with the appurtenances, to such of the uses, trusts, powers, and

APPENDIX II. provisions contained in the said settlement concerning the hereditaments thereby settled posterior to the limitation of the said term of five hundred years, as at the time of my death shall be capable of effect; and I confirm the said settlement. In witness, &c.

No. XII.

CODICIL MAKING ALTERATIONS AND ADDITIONS TO THE WILL,
AND APPOINTING DIFFERENT EXECUTORS OR TRUSTEES.

This is a codicil to my last will and testament, dated —, A. D. —. Whereas, by my said will I have given my wife one-third part of all my real and personal estate, I now declare that it is my will, that, instead of that provision, she shall have the use of one-half of all my estate, real and personal, during her natural life; and so much of the principal as may be necessary or convenient for her support during the term of her natural life, or so long as she shall remain my widow. And in the event of her marrying again, she shall be entitled to the absolute property in one-third of all my personal estate which shall then remain, and the use of one-third of my real estate during her life; and at the decease or marriage of my said wife, the remainder of all my estate, real and personal, including the reversion of the portion of the real estate, the use of which is hereinbefore devised to my said wife, shall be equally divided among my children, and the issue of any deceased child, such issue taking the share to which such child would have been entitled if living.

And I hereby revoke the appointment of A. B. to be one of my executors and trustees; and I appoint C. D. to that office, with all the powers and duties in my said will declared.

Or, Instead of the persons named as executors and trustees in my said will, I hereby appoint — — —.

No. XIII.

NUNCUPATIVE WILL.

A nuncupative will, as the term implies, is not made in writing, but by the *declaration* of the testator, in the

presence of witnesses. It is proper, although not indispensable, that such declarations should be reduced to writing, in the presence of the witnesses, at the time they are made, and subscribed by them, or some of them.

The form of the memorandum is not important, but the precise words of the testator should be preserved.

FORM.

The following is the will of A. B., mariner, soldier, or otherwise, of —, being sick and nigh unto death, which occurred the day following, at six o'clock P. M. The same was made by the said A. B. in the presence of the persons whose names are hereto subscribed, and who were specially requested by said testator to take notice of the same, as witnesses, and was in these words:

"I give my watch to A. B., my silver spoons to C. D.," &c., detailing each particular.

"All the rest I give to my wife, and she will carry this will out. She shall be the executrix.

"Done in the sick-chamber of the said A. B., on Monday the 10 April, 18—, at nine o'clock P.M."

A. B.	} WITNESSES.
C. D.	
E. F.	

If there is time and opportunity to read over the memorandum in the presence of the testator, it would be proper to state that fact in the memorandum.

An instrument for the mere purpose of revocation is sometimes executed, but as this is more readily effected by defacing the will, it is usually done in this mode, where that is at hand.

And it is common to make, in drawing a new will, a formal revocation of all former wills. But this is not important, as the making of a new will, embracing an entire disposition of the testator's estate, is, in itself, a revocation of all existing wills of the testator.

The form of a revocatory will, or of a revocatory clause, is much the same.

"I HEREBY REVOKE ALL FORMER WILLS AND CODICILS BY ME MADE."



ADDENDA.

Page 77—As to effect of delusions in reference to the ADDENDA.
conduct of children, and the question of
delusion generally. See *Boughton v. Knight*,
L. R. 3 Prob. 64.

“ 183—Note (b) add recent case of *Rees v. Rees*, L. R.
3 Prob. 84.

“ 197—Note (k) The case of *In the goods of Eymon*
is now reported in L. R. 3 Prob. 92.

“ 323—To note (c) add *In the goods of McCabe*, L. R.
3 Prob. 94.

“ 333—To note (a) add same case.

“ 346—Instance of revocation held to be absolute,
not relatively dependent. In the goods of
Gentry, L. R. 3 Prob. 80.

“ 347—To note (a) add *Dancer v. Crabb*, L. R. 3 Prob.
98.

The report of the case of *Mitchell v. Weir*, on page 44,
was taken from the report as originally printed. This
report has since been slightly altered, and the reader is
advised to refer to the report as amended.

The following are the editions of text books referred
to in this work.

Jarman on Wills, 3rd edition.

Redfield on Wills, 2nd edition.

Williams on Executors, 6th edition.



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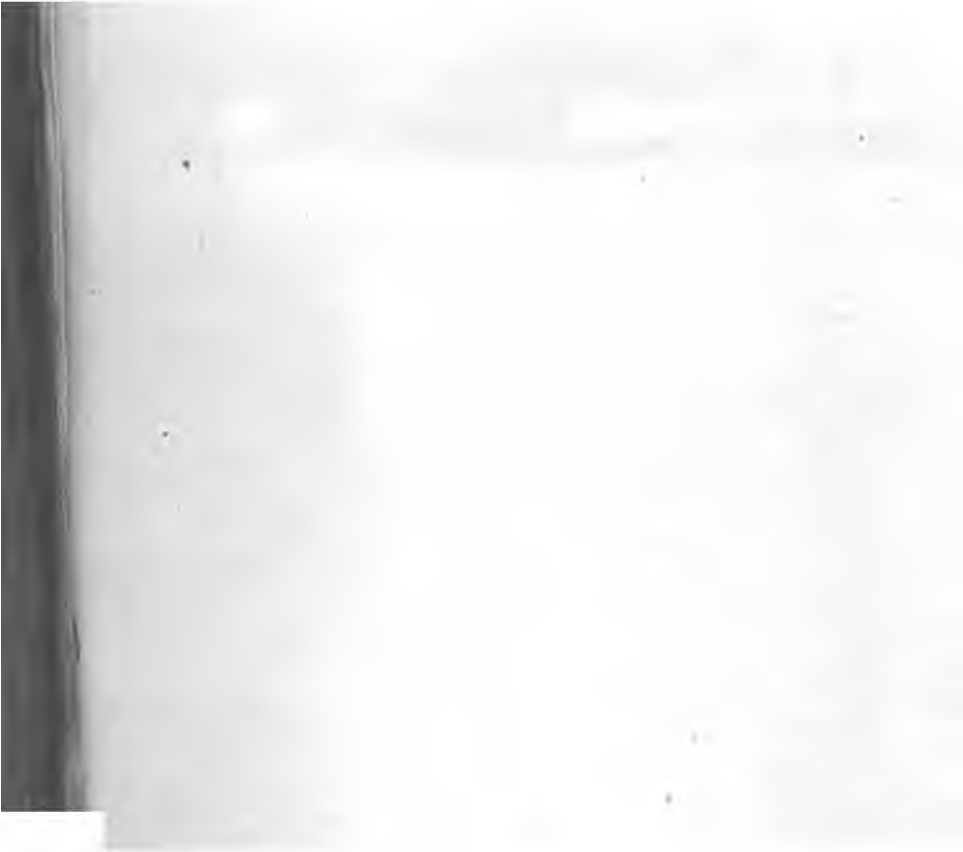
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